F.C.C. 72-751

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of ACTION RADIO, INC., DENVER, COLO. For Renewal of License of Radio Station KTLK	Docket No. 19274 File No. BR-1969

MEMORANDUM OPINION AND ORDER

(Adopted August 29, 1972; Released September 1, 1972)

BY THE COMMISSION: COMMISSIONERS H. REX LEE AND REID ABSENT; COMMISSIONER WILEY CONCURRING IN THE RESULT; COMMISSIONER HOOKS NOT PARTICIPATING

1. This proceeding involves the application of Action Radio, Inc. for renewal of its license for standard broadcast Station KTLK, Denver, Colorado. By our Order and Notice of Apparent Liability, FCC 71-678, released June 29, 1971, a hearing was specified on a number of issues concerning alleged misconduct in the operation of Station KTLK. On October 18, 1971, Action Radio filed a petition for reconsideration and grant without hearing, urging that a hearing is no longer necessary because the exhibits submitted in support of its petition demonstrate that no significant issues of fact remain to be resolved. The Broadcast Bureau opposes Action Radio's petition on grounds that serious questions remain about the licensee's operation of Station KTLK and that the licensee's responses and pleadings contain misrepresentations and are lacking in candor.[1]

2. We have fully considered the voluminous pleadings and exhibits [2] which the parties have submitted dealing with the questions in this proceeding, but no further recital of their factual contentions is required here because we are convinced that substantial and material questions of fact remain unresolved and that the petition for reconsideration should be denied. We have consistently held that questions

[1] The Bureau filed its opposition on December 9, 1971, errata thereto on December 17, 1971, and a supplement to the opposition on December 30, 1971. In addition, Action Radio filed a reply on February 14, 1972, and supplements thereto on March 8 and March 30, 1972; on February 24, 1972, the Bureau filed a petition for leave to file a response and a response to Action Radio's reply; on March 8, 1972, Action Radio filed comments on the Bureau's petition for leave to file a response and an answer to the Bureau's response; on March 27, 1972, the Bureau filed comments on Action Radio's letter to the Chairman dated March 17, 1972; and on May 15, 1972, tre Bureau filed comments on Action Radio's letter to the Chairman dated May 2, 1972. As is apparent from this recitation of dates, tne delay in the disposition of this matter is attributable in large measure to the unusual number of pleadings which have been filed.

[2] Section 1.106 of the Rules, dealing with petitions for reconsideration in general, limits such pleadings to 25 pages and subsequent reply pleadings to 10 pages. Nonetheless, Action Radio has filed a petition for reconsideration with 56 pages and a reply pleading with 80 pages without making any attempt to show good cause or to request waiver of our rules.

of credibility and veracity, such as are presented by the numerous and extensive statements filed by the parties, should not be resolved on the basis of prehearing pleadings, affidavits, and depositions, but should be determined in an adjudicatory proceeding presided over by a hearing examiner who can view the witnesses, rule on questions of evidence and demeanor, and thereafter provide us with his views on the matters in dispute. See *Gateway Broadcasting Enterprises, Inc.*, FCC 72–630, released July 25, 1972, and *Tinker, Inc.*, 2 FCC 2d 978 (1966).

3. The conflicting positions taken by the parties, in our view, clearly demonstrate: (a) that the present record is not adequate to warrant a finding that Action Radio possesses the requisite qualifications to remain a licensee and (b) that the Bureau should be afforded a full opportunity to cross-examine the witnesses favorable to Action Radio and to introduce any countervailing evidence, particularly with respect to the crucial question of whether Action Radio has made misrepresentations or was lacking in candor. See *DuPage County Broadcasting, Inc.*, 23 FCC 2d 22 (1970). For these reasons, we are convinced that the public interest will be best served by requiring the parties to compile a complete record concerning all of the circumstances surrounding the present allegations so that fully informed determinations can be made of the licensee's responsibility and of whether any sanction should be imposed.

4. In addition to its contentions going to the merits of this proceeding, Action Radio argues that it was improperly not afforded an opportunity to answer the allegations against it before this case was designated for hearing. While Action Radio relies on Section 1.89 of the Rules [3] and *Television Broadcasters, Inc.*, 1 FCC 2d 970 (1965), in support of its assertion, neither citation is in point. Since Section 1.89 applies only to revocation, suspension, or cease and desist proceedings and since this is a renewal proceeding, it is clear that the rule has no bearing upon the procedures to be followed in this case. *Television Broadcasters* is also inapposite because our comments in that case were directed not to the Bureau, but solely to counsel for two separate licensees who exceeded the bounds of proper advocacy by making various charges against each other without attempting to resolve underlying questions of fact.

5. By the same token, Action Radio's claim that it is entitled to a conference comparable to the one conducted in *Frontier Broadcasting Co.*, 29 FCC 2d 480 (1971), is without merit. While the parties are free to request the presiding examiner to schedule prehearing conferences to discuss possible stipulations or evidentiary procedures if appropriate, the conference in *Frontier* was scheduled simply on the basis of our judgment that a useful purpose would be served, not because of any demand by the applicant. Furthermore, the licensee in *Frontier*, without attempting to resolve any factual question, proposed to divest itself of certain broadcast facilities in order to avoid hearing on complex concentration of control questions, and a con-

[3] Section 1.89 provides, in part, that, except in cases of willfulness, licensees who appear to have violated the Act or the Rules will be served with a written notice stating the facts and requesting a statement concerning those facts before revocation, suspension, or cease and desist proceedings are instituted.

ference was held only so that the parties could consider procedures for implementation of the divestiture proposal. Since Action Radio seeks a conference for the sole purpose of resolving strenuously contested questions of fact, and since there are no procedural matters to be considered at this time, we perceive no reason to schedule a conference in this case.

6. In conjunction with the arguments rejected in paragraphs 4 and 5, Action Radio also asserts that the Bureau is prejudiced against and is persecuting the licensee. Besides stating this argument in its pleadings, counsel for Action Radio has directed two separate letters to the Chairman, with copies to all Commissioners, complaining about the Bureau's approach to this case. In response, the Bureau questions the propriety of Action Radio's use of letters to the Chairman to complain about the Bureau's approach to this case. Without prolonging our discussion of this matter, we believe that the better practice would be to submit material of this nature in the form of pleadings.

7. Accordingly, IT IS ORDERED:

(a) That the Broadcast Bureau's petition for leave to file response to reply of Action Radio, Inc., filed February 24, 1972, IS GRANTED and the Bureau's response filed the same date IS ACCEPTED; and

(b) That the petition for reconsideration of order designating case for hearing, filed October 18, 1971, by Action Radio, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-840

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PARTS 2 AND 87 OF THE RULES TO PROVIDE 50 KHZ CHANNEL SPACING IN THE AERONAUTICAL RADIO NAVIGATION BAND 108–117.975 MHz	Docket No. 19590 RM 1888

NOTICE OF PROPOSED RULE MAKING

(Adopted September 20, 1972; Released September 26, 1972)

BY THE COMMISSION: COMMISSIONERS BURCH, CHAIRMAN; JOHNSON, REID, AND WILEY CONCURRING IN THE RESULT; COMMISSIONER ROBERT E. LEE ABSENT.

1. The Department of Transportation, Federal Aviation Administration (FAA) has requested that consideration be given to changes in the FCC Rules and Regulations, Parts 2 and 87, to accommodate 50 kHz channel spacing for certain navigation aids. The FAA states that service on new or modified ILS and VOR and Y channel DME/TACAN is proposed for implementation in 1973.

2. The navigation aids operate in the band 108–117.975 MHz which is allocated to the Aeronautical Radionavigation Service along with the bands 328.6–335.4 MHz and 960–1215 MHz similarly allocated. Presently, the Rules require 100 kHz spacing between frequency assignments in the band 108–117.975 MHz.

3. The FAA reports that rapidly expanding aviation services have resulted in the need for additional instrument landing systems and enroute navigation aids. The radio frequency congestion for instrument landing systems (ILS) and VHF Omnirange (VOR) systems has become severe in the Boston/New York/Washington, Chicago/Detroit, and San Francisco/Los Angeles areas. Additionally, planned ILS systems will enlarge the areas of congestion problems. Presently, the shortage of frequencies has made it impossible to provide for proposed and required navigation aids. This places unacceptable limitations on the accommodation of certain planned National Airspace System (NAS) ground facilities.

4. Two separate studies on this subject have been conducted by the Electromagnetic Compatibility Analysis Center (ECAC) of the Department of Defense. The first of those studies revealed that 41 ILS channels would be required if every ILS at an airport were to be assigned a discrete frequency. If ILS's on opposite ends of the same

runway could use a common frequency (time shared) the requirement would drop to 23. At present there are only 20 channels available. That study was the basis for the FAA decision, announced at the April 1970 FAA Planning Review Conference, that split channeling for the VOR, ILS and TACAN/DME bands was a necessity. The second study indicated that by June 1972 a minimum of 24 channels would be required if every ILS at an airport utilized a discrete frequency, or 17 by sharing between ILS's at opposite ends of a runway. More recent FAA studies have disclosd that 50 kHz frequency assignment will be required to accommodate many of the new ILS's planned for FY 73.

5. It is of interest that the International Civil Aviation Organization (ICAO) has long recognized the need for 50 kHz spacing in the 108–117.975 band in certain areas and, as early as 1966, revised their Air Navigation Plan to provide for the utilization of the split channels. Several areas of Europe presently utilize 50 kHz channel spacing. France, for example, implemented some VOR's on odd twentieths of a megacycle (50 kHz spacing) in 1970. The FAA reports that actual equipment testing has shown that the ICAO limits for harmonic radiation provide satisfactory operation of adjacent-channel 50 kHz VOR facilities.

6. The FAA, by their Advisory Circular No. AC 170–12 advised aircraft owners, operators and radio manufacturers of plans for future implementation of split channel assignments in the aeronautical radionavigation bands. The circular gave advance notice that equipment not configured to utilize the new channels might have limited life expectancy, depending on the areas of usage.

7. Implementation of 50 kHz channel spacing will require an increase of frequency stability for the glide slope, localizer and VOR ground transmitters. The frequency tolerances of these transmitters must necessarily be reduced from the present .005 percent to .002 percent. The airborne equipment of almost all general aviation and military aircraft will be affected by the implementation of channel splitting. The air carrier equipment will be affected to a lesser degree. Most airlines already have avionics equipment, except glide slope receivers, which is designed for 50 kHz operation or can be modified quickly and economically to operate in the split channel environment. The greatest impact will be for all users of glide slope equipment because very few glide slope receivers in use today are capable of being used in the new environment or have the capability to be economically modified.

8. The FAA, as explained in Advisory Circular No. AC–170–12, has set a target date of January 1, 1973 for the beginning phase of their program for national implementation of the split channel environment. The proposed implementation plan, as presented by the FAA, would confine the assignment of split-channel frequencies to those areas where 100 kHz assignments are impossible or impractical in terms of the number of frequency changes required at existing facilities. In addition, the initial facility separation criteria will minimize

the interference by 100 kHz equipped aircraft tuned to adjacent channel 100 kHz ground facilities. In this regard the ICAO recommended figure is 26 dB for rejection in a 100 kHz receiver when receiving a signal 50 kHz removed. It is expected that existing receivers that do not now possess the 26 dB rejection capability can easily be adjusted or modified to obtain this rejection figure. The FAA states that the split channel assignments will consider existing ground and airborne equipment limitations, and that delay in permitting the use of these channels can be expected to result in increasing pressure on the safety service provided by the Navigation Aids.

9. We agree with the FAA in their conclusion that, in certain areas, the present 100 kHz channel spacing is inadequate. Additionally, we agree that it is necessary to split the channels and to revise the equipment frequency stability requirements to insure the operational feasibility of a 50 kHz system. We consider the investigative programs of the last several years to have given substantial proof of the channel-splitting requirement as well as having provided the basis for a conclusion that it is reasonable to expect the FAA's implementation program to provide service without undue hardship to either government or non-government system users. Further, we consider that the FAA, through such actions as their advisory circular No. AC–170–12 and actions with the ICAO, has kept the aeronautical community sufficiently informed as to make it possible for the start of implementation in 1973. We, therefore, intend to provide the additional channels by providing for 50 kHz separation as requested unless comments to this Notice which present convincing evidence of the undesirability of such action are received.

10. The proposed amendment, as set forth in the Appendix is issued pursuant to authority contained in Section 4(1), and 303(b)(g) and (r) of the Communications Act of 1934, as amended.

11. Pursuant to procedures set forth in Section 1.415 of the Commission's Rules, interested parties may file comments on or before November 8, 1972, and reply comments on or before November 17, 1972. All relative and timely comments and reply comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision in this proceeding, the Commission may also take into account other relevant information before it in addition to the specific comments invited by this notice. Responses will be available for public inspection during regular business hours in the Commission's Broadcast and Docket Reference Room at its headquarters in Washington, D.C.

12. In accordance with the provisions of Section 1.419 of the Commission's Rules, an original and 14 copies of all statements briefs, or comments filed shall be furnished the Commission.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

1. In Part 2, Subpart B, Section 2.106 Table of Frequency Allocations the listings in columns 10 and 11 of the band 108–117.975 MHz are amended to read as follows:

§ 2.106 Table of Frequency Allocations:

Frequency (MHz)	Nature of {SERVICES stations
10	11
* * *	* * *
108.05	Omni-directional range.
108.10	Localizer.
108.15	Do.
108.20	Omni-directional range.
108.25	Do.
108.30	Localizer.
108.35	Do.
108.40	Omni-directional range.
108.45	Do.
108.50	Localizer.
108.55	Do.
108.60	Omni-directional range.
108.65	Do.
108.70	Localizer.
108.75	Do.
108.80	Omni-directional range.
108.85	Do.
108.90	Localizer.
108.95	Do.
109.00	Omni.
109.05	Do.
109.10	Localizer.
109.15	Do.
109.20	Omni.
109.25	Do.
109.30	Localizer.
109.35	Do.
109.40	Omni.
109.45	Do.
109.50	Localizer.
109.55	Do.
109.60	Omni.
109.65	Do.
109.70	Localizer.
109.75	Do.
109.80	Omni.
109.85	Do.
109.90	Localizer.
109.95	Do.
110.00	Omni-directional range.
110.05	Do.
110.10	Localizer.
110.15	Do.
110.20	Omni.
110.25	Do.
110.30	Localizer.
110.35	Do.
110.40	Omni.
110.45	Do.
110.50	Localizer.
110.55	Do.
110.60	Omni.
110.65	Do.
110.70	Localizer.
110.75	Do.
110.80	Omni.
110.85	Do.
110.90	Localizer.
110.95	Do.
111.00	Omni.
111.05	Do.
111.10	Localizer.
111.15	Do.
111.20	Omni-directional range.
111.25	Do.
111.30	Localizer.
111.35	Do.
111.40	Omni.
111.45	Do.
111.50	Localizer.
111.55	Do.
111.60	Omni.
111.65	Do.
111.70	Localizer.
111.75	Do.
111.80	Omni.
111.85	Do.
111.90	Localizer.
111.95	Do.
112.00–117.95 (NG 34).	Omni-directional range.
* * *	* * *

3. Part 87, Subpart N, Sections 87.501(a) and (d) are revised to read as follows:

§ 87.501 **Frequencies available:**

* * * * * * * *

(a) **Localizer station with simultaneous radiotelephone channel. The frequencies:**

MHz	*MHz*	*MHz*	*MHz*
108.10	109.10	110.10	111.10
108.15	109.15	110.15	111.15
108.30	109.30	110.30	111.30
108.35	109.35	110.35	111.35
108.50	109.50	110.50	111.50
108.55	109.55	110.55	111.55
108.70	109.70	110.70	111.70
108.75	109.75	110.75	111.75
108.90	109.90	110.90	111.90
108.95	109.95	110.95	111.95

* * * * * * *

(d) Radio Range stations: 112.05 MHz through 117.95 MHz and the following frequencies in the 108–112 MHz band.

MHz	*MHz*	*MHz*	*MHz*
108.20	109.20	110.20	111.20
108.25	109.25	110.25	111.25
108.40	109.40	110.40	111.40
108.45	109.45	110.45	111.45
108.60	109.60	110.60	111.60
108.65	109.65	110.65	111.65
108.80	109.80	110.80	111.80
108.85	109.85	110.85	111.85
109.00	110.00	111.00	112.00
109.05	110.05	111.05	112.05

* * * * * * *

F.C.C. 72-849

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 97 OF THE COMMISSION'S RULES TO PROVIDE FOR EXPANSION OF THE TELEPHONY SEGMENTS OF THE HIGH FREQUENCY AMATEUR BANDS	Docket No. 19162 RM-1306, RM-1349, RM-1477, RM-1479, RM-1544, RM-1550, RM-1593, RM-1603, RM-1614, RM-1616, RM-1644, RM-1665, RM-1695, RM-1723, 1729. Also RM-1748, RM-1873, RM-1880.

REPORT AND ORDER

(Adopted September 27, 1972; Released October 2, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission adopted a Notice of Proposed Rule Making in the above entitled matter on February 24, 1971, which was published in the Federal Register on March 6, 1971 (36 FR 4511). Interested persons were invited to file comments on or before June 1, 1971, and reply comments on or before June 18, 1971, respectively. The Notice proposed to expand the General-Conditional Class sub-band operator privileges in four amateur radio high frequency bands, to provide additional Amateur Extra and Advanced Class sub-bands in those high frequency bands where they do not exist, and to make other adjustments to the allocations of high frequency bands to facilitate the accomplishment of these proposals and additionally to expand the telephony sub-allocations in the five amateur radio high frequency bands from 3.5 to 29.7 MHz.

2. Formal comments were received from persons and amateur radio organizations within the United States and foreign countries. Many comments simply urge the adoption, or the rejection, of the proposals. Others endorse certain proposals and request that others not be adopted. Many propose alternate frequency band allocation plans. Since the comments received were so numerous, it is not practicable to discuss each herein. However, every comment filed has been given careful consideration.

3. Reactions to the proposals expressed in the comments, were highly mixed. Some, identifying themselves as telegraphy enthusiasts, opposed the proposal, usually citing the resulting reduction in the effective use of the telegraphy bands as the reason. Others, identifying themselves as telephony enthusiasts, supported the proposal, usually giving the crowded telephony bands as the reason. Proponents of both sides of the issue agreed that telephony expansion would be at the expense of telegraphy operation, with the telegraphers arguing that their preferred mode of radiocommunication would be impaired and the telephony advocates arguing that telegraphy is outmoded and unnecessary.

4. All of the HF bands from 3–30 MHz have predictable propagation characteristics depending on the period of the sunspot cycle, season, time of day, and the order of the frequency band itself. At times, some bands are primarily useful for short-distance radiocommunication, even though under those circumstances signals cross national boundaries. At other times, even the two main lower frequency amateur bands (3.5, 7.0 MHz) become international in character through long distance ionospheric propagation of signals. During the low period of the sunspot cycle, congestion in the lower frequency bands becomes more critical as the maximum usable frequency (MUF) decreases. Bands above 14 MHz, are generally considered international in nature by reason of long distance propagation of signals in these bands for a large percentage of the time.

5. A considerable number of comments were received from organizations located in other countries, and a delegation from one country paid an official visit to the Commission to discuss the ramifications of the Notice. The comments and information of other countries are worthwhile, and provide an added insight to what is normally considered a domestic matter. It is recognized that there are no formal internationally agreed sub-allocation plans which reserve certain portions of any of these bands for one type of emission or the other. There are, however, "gentlemen's agreements" among amateurs in various parts of the world (Region 1 in particular) which have worked out well in practice in maintaining order and providing efficient utilization of the various amateur bands. Only a few countries, having large numbers of amateurs, provide sub-allocations in domestic regulations. The International Radio Regulations, to which the United States is a signatory administration, provides only band allocations to the Amateur Radio Service for the three Regions. In reaching a judgment on a matter with implications which could result in a lessening of international goodwill among amateurs, as well as a reduction of efficiency of utilization of the spectrum, we would be doing amateurs generally a disservice were we to disregard physical phenomena. Certainly we would be short-sighted if we totally disregarded opinions such as that of the International Amateur Radio Union, Region 1 Division, which pointed out,

"The downward shift to 14,150 kHz will cause severe interference to operation in Region 1. With the high power and large number of US stations it will not be possible for foreign stations to operate above 14,150 kHz when propagation conditions enable USA stations to be heard. The consequent move downward

in frequency by Region 1 Telephony stations will undoubtedly cause breaches of the voluntary IARU Region 1 band plans which have been in satisfactory operation for a number of years."

A similar opinion was expressed by the Radio Society of Great Britain and others.

6. Therefore, we conclude that a significant expansion of the telephony segments within the high frequency amateur bands would be at the expense of the telegraphy segments. Furthermore, we are of the opinion that the traditional amateur telegraphy radiocommunication mode must not be compromised. The rationale for this conclusion is well summarized in a quotation from a letter to the Chairman of the Commission from the Director of the Office of Telecommunications Policy:

"While the use of CW radio telegraph communications has been replaced in most radiocommunications services with more sophisticated techniques over the years, this is not considered sufficient reason to justify the curtailment of such operations among U.S. amateurs. Knowledgeable communicators agree that when other types of high frequency radiocommunications fail CW transmissions are likely to get through. Thus, even though other techniques might be relied on first, it still would be wise to retain a pool of U.S. citizens skilled in CW operations as a resource in reserve. Amateur operators, with their past superb record of serving the public interest when needed, are considered the best means for preserving this skill."

7. We find that amateurs have been resourceful in effectively operating in the overcrowded high frequency bands. The vast majority have adopted spectrum conservation receiving and transmitting techniques. The nearly universal incorporation of suppressed or reduced carrier types of SSB emission and other frequency conserving capabilities, such as highly selective receivers and directional antennas, has permitted more operators to conduct reliable radiocommunication over greater distances. Nevertheless, the question of how the existing high frequency amateur bands can accommodate even a relatively modest increase in the number of stations is now clearly in view. As evidenced by the petitions and comments, even the present number of amateurs authorized for telephony emissions on the high frequency bands at times far exceeds the capacity of the allocated A3 and F3 emission segments. We see no technological developments on the horizon to enable more simultaneous telephony amateur radiocommunication within the present sub-allocations, although this is in itself a challenge to amateurs. Any proposed amendments to Article 5 (spectrum allocation) of the International Radio Regulations to allocate additional portions of the high frequency spectrum to the Amateur Radio Service, are at best some years in the future and only speculative. The only practical solution appears to be one of limiting access to the more crowded bands only to higher class licensees. Until such time as this becomes necessary, amateurs are encouraged to utilize other emissions and frequency bands during times of severe overcrowding of the telephony segments. Furthermore, we strongly urge that the VHF and UHF bands be utilized for all local radiocommunication; that the minimum power rules be strictly observed to minimize interference; that full carrier double sideband emission not be used in the lower four HF bands except in an emergency; and that all amateurs exercise good

judgment and restraint when selecting a frequency and emission for their operation.

8. Accordingly, we conclude that the high frequency spectrum available to the Amateur Radio Service does not allow treatment which would significantly alleviate the problem of overcrowding in telephony radiocommunication through expansion of sub-band allocations. We are of the opinion that a small increase for telephony operation in the 3.5 and 7.0 MHz bands can be accommodated without causing a serious deterioration in telegraphy operation. We believe any telephony expansion of the 14.0 MHz band would result in a serious degradation to non-voice radiocommunication, and no expansion is adopted. Numerous comments from amateurs outside the United States express opposition to any telephony expansion by the United States, particularly in the 14.0 MHz band. Should U.S. licensees be permitted to operate in the unofficial, but widely observed, non-US telephony sub-band between 14.1 and 14.2 MHz, they predict a movement by non-US telephony stations into the 14.0 to 14.1 MHz segment, causing a deterioration in telegraphy radiocommunication and a general breakdown in inter-Region cooperation. This must not take place. We also find the 21.0 and 28.0 MHz frequency bands not to be sufficiently crowded to warrant an expansion of the telephony segments.

9. Comments from Canadian amateurs express concern for the resulting impact of expansion of the telephony segments available to US amateurs below 3.8 MHz. In addition to the 3.8 to 4.0 MHz telephony sub-band authorized for both US and Canadian amateurs, they are also permitted 3725 to 3800 kHz. This concern is expressed in the comments from the Director of the Canadian Division of the American Radio Relay League. Although we do not agree entirely with the implied necessity for Canadian amateurs to operate in different sub-bands, their comments are taken into account.

> "Canadian amateur operators have always made extensive use of the 3.5 MHz band. The size of the country and the low density of population have precluded the use of other frequencies, such as 144 MHz, since they did not provide adequate coverage. It is perhaps the most widely used amateur band in Canada for internal communication, in spite of the fact that 25 kHz, (3725–3750 kHz) are shared with American Novice operators. While Canadian voice operation could and undoubtedly would be moved to some lower portion of the band such as 3650–3700 kHz, in order to avoid Novice interference, there would be less space available for other modes as a result * * *"

10. The Notice proposed 3750 to 3775 kHz for Amateur Extra Class and 3775 to 3875 kHz for Amateur Extra and Advanced Classes, an expansion of 50 kHz for telephony privileges. The American Radio Relay League, and others, recommend an expansion of only 25 kHz, limited to Amateur Extra Class operators only. This would authorize some 12 thousand higher class licensees to operate within the 3775–3800 kHz sub-band. In recognition of the Canadian operators' comments, we are of the opinion that the American Radio Relay League recommendation is a workable compromise, and we are therefore adopting it.

11. We conclude that the 7.0 MHz telephony sub-band can be expanded as proposed to the extent of permitting A3 operation between 7150 and 7200 kHz. While the comments heavily favor the adoption of this proposal, objections were also made, although to a lesser extent,

by Canadian amateurs, because telephony operation is authorized in Canada by the Department of Communication for the same segment. Since the expanded telephony segment of 7150 to 7200 kHz has been heavily utilized for Novice Class A1 operation, and since only a limited number of higher class licensees will be permitted to operate within the new telephony segment, the expansion is acceptable. As a result of this action, the Novice band is relocated to 7100 to 7150 kHz.

12. The proposal to provide a telephony sub-band below 7100 kHz for contacts with stations in Regions 1 and 3, is not being adopted. Numerous comments pointed out that the proposal, if adopted, would make inter-regional radiocommunication with foreign stations occupying these frequencies more difficult since Region 2 stations would overload the segment. The proposal to permit telephony operation between 7075 and 7100 kHz for American stations located outside of Region 2 is adopted, however.

13. In the interest of encouraging beginning amateur operators to gain experience in telegraphy radiocommunications, a new Novice privilege segment is adopted for 28.100 to 28.200 kHz. Observations indicate that the segments 21.200 to 21.250 MHz and 145–147 MHz are lightly occupied for Novice operation and are therefore deleted. In light of these changes, and because of the relocation of the Novice 7.0 MHz sub-band, the requirement that the transmitter be crystal controlled is removed. We are of the opinion that the technical state of the art for calibrated variable frequency generating devices in the Amateur Service permits this change and re-crystalling of the many thousands of Novice Class transmitters is unwarranted. Additionally, this will enhance the operating effectiveness of Novice operation through reduction of interference and increased operating flexibility. Since the distinctive "N" designator in a Novice Class call sign prefix is easily recognized in the Service, Novice operators are cautioned to observe strictly the authorized frequency sub-allocations for Novice Class licensees. While amending paragraph 97.7(d), we revise the wording for the 75 watt power limitation to generalize its application to other amplifying devices in addition to vacuum tubes.

14. As pointed out by a number of respondents, the 28 MHz frequency band does not offer itself to providing meaningful exclusive operating segments for upgrading incentives since the frequency availability problem is not of comparable magnitude as that encountered on the other high frequency bands. For this reason, the proposed establishment of exclusive operating frequency privileges for Amateur Extra Class and Advanced Class licensees is not adopted. With thousands of amateur radio operators upgrading to Amateur Extra Class and tens-of-thousands upgrading to Advanced Class, while the number of General and Conditional Class licensees is decreasing, adjustments to the sub-band allocations must be made in order to retain the incentive principle. Additional adjustments will be made periodically in the future as the upgrading movement continues. Allocations follow a pattern of apportionment of the telephony segments into three sub-bands in the case of 3.5 MHz and 21.0 MHz; one restricted to Amateur Extra exclusively; one restricted to Amateur Extra and Advanced; and one available to General/Conditional and Extra/Advanced. These sub-band apportionments are determined by considering the number of

individual licensees in each group having privileges to each sub-band weighted in favor of the higher classes. Proposed telephony sub-bands restricted to the Amateur Extra Class in the 7.0 MHz and 14.0 MHz bands are not adopted because the application of the apportionment pattern to these smaller telephony segments would result in Amateur Extra Class sub-bands so small as to be practically useless.

15. Comments received in response to the proposed reduction in the Amateur Extra-restricted telegraphy sub-band were almost entirely opposed. Reasons cited included observations to the effect that the proposed 10 kHz sub-band was too small to be meaningful, and that the restricted telegraphy sub-band was their primary incentive for upgrading. We find these comments persuasive and in agreement with our own observations. The proposal is not adopted herein, and the sub-band remains at 25 kHz.

16. We find the attached amendments to the rules are necessary and desirable and in the public interest. Authority for adoption of these amendments is contained in Sections 4(i) and 303 of the Communications Act of 1934 as amended.

17. Accordingly, IT IS ORDERED, that effective November 22, 1972, Part 97 of the Commission's Rules is AMENDED as set forth in the attached Appendix.

18. IT IS FURTHER ORDERED, that in addition to the fifteen petitions set forth in the heading to the proceeding, the pending petition of Mr. Frederick J. Hagen, filed February 1, 1971, RM–1748; and the pending petition of Mr. George W. Flyer, filed November 1, 1971. RM–1873; and the pending petition of Mr. William G. Welsh, filed November 8, 1971, RM–1880, have been fully considered and, to the extent that they are at variance with the rule changes adopted, they are DENIED.

19. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION.
BEN F. WAPLE, *Secretary.*

APPENDIX

Part 97 of the Commission's Rules is amended as follows:

1. Section 97.7(a) and table, subparagraphs (d)(1) and (d)(2) are revised to read as follows:

§ 97.7 *Privileges of operator license*

(a) *Amateur Extra Class and Advanced Class.* All authorized amateur privileges including exclusive frequency operating authority in accordance with the following table:

Class of license authorized:	*Frequencies (kHz)*
Amateur extra only	3500–3525
	3775–3800
	7000–7025
	14000–14025
	21000–21025
	21250–21270
Amateur extra and advanced	3800–3890
	7150–7225
	14200–14275
	21270–21350
	50–50.1 MHz

* * * * * * *

(d) *Novice class.* Those amateur privileges designated and limited as follows:

(1) The power input to the transmitter final amplifying stage supplying radio frequency energy to the antenna shall not exceed 75 watts, exclusive of power for heating the cathode of a vacuum tube(s).

(2) Radio telegraphy is authorized in the frequency bands 3700–3750 kHz, 7100–7150 kHz (7050–7075 kHz when the terrestrial location of the station is not within Region 2), 21,100–21,200 kHz, and 28,100–28,200 kHz, using only type A–1 emission.

2. In Section 97.61, the table in paragraph (a) is amended and (b)(10) is added to read as follows:

§ 97.61 *Authorized frequencies and emissions*

(a) * * *

Frequency band	Emissions	Limitations (see paragraph (b))
kHz		
1800–2000	A1, A3	1, 2
3500–4000	A1	
3500–3775	F1	
3775–3890	A5, F5	
3775–4000	A3, F3	4
7000–7300	A1	3, 4
7000–7150	F1	3, 4
7075–7100	A3, F3	10
7150–7225	A5, F5	3, 4
7150–7300	A3, F3	3, 4
14000–14350	A1	
14000–14200	F1	
14200–14275	A5, F5	
14200–14350	A3, F3	
MHz		
21.000–21.450	A1	
21.000–21.250	F1	
21.250–21.350	A5, F5	
21.250–21.450	A3, F3	
28.000–29.700	A1	
28.000–28.500	F1	
28.500–29.700	A3, F3, A5, F5	
* * *	* * *	* * *

(b) * * *

(10) The use of A3 and F3 in this band is limited to amateur radio stations located outside Region 2.

F.C.C. 72D-51

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of ANTHONY MAIER ENTERPRISES, INC., CINCINNATI, OHIO	Docket No. 19351 File No. 49-A-L-91
and CINCINNATI AIRCRAFT, INC., CINCINNATI, OHIO	Docket No. 19352 File No. 129-A-L-91
For Aeronautical Advisory Station to Serve the Lunken Airport, Cincinnati, Ohio	

APPEARANCES

William J. Walsh (Lindhorst & Dreidame) for Maier; *Robert A. McNally* (Bucciere, McNally, Ihrig & Co., L.P.A.) for Cincinnati Aircraft; *Joseph Feldkamp*, Trustee in Bankruptcy for Queen City; and *Terrence P. O'Brien* for the Chief, Safety and Special Radio Services Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER HERBERT SHARFMAN

(Issued July 27, 1972; Effective date September 25, 1972; pursuant to Section 1.276 of the Commission's Rules)

PRELIMINARY STATEMENT

1. By Commission Order (of the Chief, Safety and Special Radio Services Bureau, acting under delegated authority), released November 24, 1971, pursuant to Section 309(e) of the Communications Act of 1934, as amended, and Section 0.331(b)(21) of the Commission's Rules, the captioned applications were designated for hearing in a consolidated proceeding. Both applicants seek Commission authority to operate an aeronautical advisory station at Lunken Airport, Cincinnati. Rule 87.251(a) provides that only one aeronautical advisory station may be authorized to operate at a landing area, so the applications are mutually exclusive.

2. The designation order, except as indicated by the specified issues, found each of the applicants otherwise qualified. The issues are as follows:

(a) To determine if Queen City Flying Service, Inc. has ceased operation of aeronautical advisory station KRK 2 at Lunken Airport, and if so,

(b) To determine which applicant would provide the public with better aeronautical advisory service based on the following considerations:

(1) Location of the fixed-base operation and proposed radio station in relation to the landing area and traffic patterns;

(2) Hours of operation;

(3) Personnel available to provide advisory service;
(4) Experience of applicant and employees in aviation and aviation communications;
(5) Ability to provide information pertaining to primary and secondary communications as specified in Section 87.257 of the Commission's Rules;
(6) Proposed radio system including control and dispatch points; and
(7) The availability of the radio facilities to other fixed-base operators.
(c) To determine in light of the evidence adduced on the foregoing issues which, if either, of the applications should be granted.

3. On a motion to enlarge issues filed by Maier, alleging unauthorized operation of the Unicom by Cincinnati Aircraft, the following issue was added by the Review Board:

To determine whether Cincinnati Aircraft, Inc. has operated an aeronautical advisory station at Lunken Airport without a valid authorization, in violation of Commission Rules and the Communications Act of 1934, and, if so, the effect of such violation on Cincinnati Aircraft's qualifications to be a Commission licensee.

4. A prehearing conference was held in the Commission's offices in Washington on January 10, 1972. A hearing in Cincinnati was held on April 24 and 25, 1972, when the record was closed. The applicants filed initial proposed findings of fact and conclusions by June 28, as did counsel for the Bureau (recommending a grant to Cincinnati Aircraft). Applicants filed replies by July 18. The Hearing Examiner had granted an oral motion by counsel for Cincinnati Aircraft, on the record, to view Lunken Airport. In the company of counsel for both applicants he "viewed" the airport on the morning of April 26.

Findings of Fact

5. Lunken Airport is now served by an FAA Flight Service Station on a 24-hour basis, and by an FAA Airdrome Control Station which operates from 7 a.m. to 11 p.m. Rule 87.253 requires aeronautical advisory stations at landing areas served by such FAA facilities to operate on the frequency 123.0 MHz. Rule 87.257(d)(1) prohibits an aeronautical advisory station from transmitting information on the conditions of runways, wind conditions, or weather information, during the hours of operation of the Airdrome Control Station or FAA Flight Service Station.

6. With respect to issue (a), concerning the status of Queen City Flying Service, the parties stipulated that Queen City Flying Service, Inc. has ceased operation of Aeronautical Advisory Station KRK 2 at Lunken Airport. Queen City stopped operating by January 28, 1971.

7. *Location of the Fixed-Base Operation and Proposed Radio Station in Relation to the Landing Area and Traffic Patterns* (*Issue* (*b*)(*1*)). The runways at Lunken Airport are 2R/20L, 2L/20R, 15/33 and 6/24. Maier is located in hangar No. 24. In relation to the landing area and traffic pattern, Maier is almost opposite runway 2L, about 1,000 feet from runway 6/24. Cincinnati Aircraft has two locations: in hangar No. 2, and in hangar No. 5. The latter is on the north side of the field opposite to and about 1,200 feet from the Administration Building on Wilmer Avenue, on the same side of the field as the control tower.

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8. The prevailing runway is 20L/2R. It is lighted and used after the FAA control tower closes at 11 p.m. (2300 hours). Aircraft using the field after 11 p.m. rely on FAA Flight Service for information, which, as indicated above, is provided around the clock.

9. *Hours of Operation* (*Issue* (*b*)(*2*)). Maier is normally open from 8 a.m. to 10 p.m., seven days a week, with additional hours if required. Cincinnati Aircraft's hours of operation are from 6 a.m. to 11 p.m., seven days a week. William Helton, Cincinnati Aircraft's night line chief, is always on call. A recorded message on the telephone informs callers of Mr. Helton's telephone number so that he may be reached when Cincinnati Aircraft is closed. Maier and Cincinnati Aircraft take alternate weekly turns servicing the ramp between 8 a.m. and 10 p.m.

10. *Personnel Available to Provide Advisory Service* (*Issue* (*b*)(*3*)). Maier has eight full-time and four part-time employees. Four of them hold FCC radio operator permits and four have applied for permits. Two girls work in the office where the proposed station would be located, one from 8 a.m. to 1 p.m., and the other from 1 to 10 p.m. In addition, Mr. and Mrs. Maier are available daily; they are both FCC-licensed operators.

11. Cincinnati has about thirty employees; of them four or five operate the Unicom. All the operators, except one recent acquisition, are licensed and experienced.

12. *Experience of Applicant* (*Issue* (*b*)(*4*)). Mr. Maier has been piloting airplanes since 1948. He and his wife have been in the fixed-base operation since 1964. Maier has operated its own radio system since 1967. The system consists of an Aeronautical Multicom station (KIM–6), authorized on October 26, 1967, for communications "limited to the necessities of directing aerial activities pertaining to aerial advertising." Mr. Maier describes this service as a "Multi-Unicom, if you are landing at Lunken Airport, desire service after you come off of 121.9, which is ground, you can call KIM–6, and when you call KIM–6 on 122.9, we immediately answer and say, 'this is KIM–6, can we be of service to you,' and they would like to know where they can get a car, or would I call them a cab, or would I come to the ramp and service them for gasoline. Then we ask them what type of gasoline, and what kind of credit card they want us to put it on, and what else can we do" (Tr. 223). Maier has radio transmitters, operating on 122.9 MHz, installed in his fuel trucks, and dispatches the trucks by the radio. Maier considers these stations to be Multicom stations, but he has no FCC authorization for the radio equipment in the trucks. This portion of the operation is unlicensed and if licensed, Maier's use would be in conflict with the applicable rules governing Multicom operations. The Maier letterhead contains a crossed arrangement of letters which might be construed as an assertion that it already offers authorized Unicom service.

13. Cincinnati Aircraft now operates the Unicom at Lunken Airport on the frequency 123.0 MHz pursuant to Special Temporary Authority issued by the Commission. On or about January 28, 1971, Cincinnati Aircraft began operation of the Unicom formerly operated by Queen City Aviation (see below).

14. Cincinnati Aircraft provides a full line of aircraft services and facilities—refueling, in-hangar storage, towing, power starts, service department, student pilot training, and charter and rental of aircraft. It owns hangar No. 5, but the Gulf Oil Company holds a mortgage on the property. Hangar No. 2 is leased from the City.

15. The officers and majority stockholders of Cincinnati Aircraft had been in their present positions for one year and two months at the time of the hearing. Before this, in 1971, the stock was owned by Witham Smith and Douglas Clark. Richard Sust, manager and vice president of Cincinnati Aircraft, was a barber until he entered the aircraft business in 1967. He became general manager in December 1971. Cincinnati Aircraft proposes a finding that Mr. Sust has been a licensed pilot for the past 17 years, citing Tr. 176. The transcript reads only that Mr. Sust has been "flying" for about 17 years (perhaps this can be construed to mean that he has piloted airplanes). The transcript, however, clearly supports the additional finding that Mr. Sust has held a commercial pilot's license for about three years (Tr. 176–177). Cincinnati Aircraft has several liens against it filed by the United States Government. In addition, the airport authorities have several times revoked Cincinnati Aircraft's ramp privileges for failure to pay its bills on time. It also operates a Citizens Band Class D station for dispatching fuel orders.

16. There was testimony, inconclusive in consequence, of complaints against the Unicom operation of Cincinnati Aircraft. Thus the Chief Controller of the FAA control tower at Lunken testified [1] that pilots had complained to him about not being able to raise the Unicom. He did not know, however, why the Unicom had failed to respond (Tr. 80), and conceded that there were reception and transmission difficulties at the airport. The Superintendent of Lunken Airport testified that he had received complaints from pilots that they could not get service on the ramp from Cincinnati Aircraft (Tr. 104). Other witnesses offered testimony of similarly inconsequent nature, either expressing a personal preference for Maier service, or testifying to dealing with one of the applicants though not disapproving of the other, or that they preferred to do business with Cincinnati Aircraft.

17. *Ability to Provide Information* (*Issue* (*b*)(*5*)). As already stated, Lunken Airport is served part-time by an FAA control tower and continuously by an FAA flight service station. The applicants are the two fixed-based operators servicing planes on the ramp.

18. Maier sells fuel, service, gasoline, batteries, automobile gasoline, and all airplane accessories. It has a courtesy car and four rental cars. It makes arrangements for hotel/motel accommodations on the average of two or three times a day. Maier services single-engine, twin-engine, land and sea airplanes, and helicopters. It sells Shell fuel in two jet fuel trucks and three combination 80 and 100 octane trucks. Maier owns the hangar and its facilities and the storage space, all of which are on ground leased from the City.

19. Cincinnati Aircraft has an operations book with most of the information relating to secondary communications. The book includes

[1] It was stipulated that the Assistant Chief Controller, if called, would have testified similarly (Tr. 82).

data on hotels, motels, taxi service, rent-a-car service, limousine service, customs service, and many other matters incidental to advisory service. In addition, the operators are familiarized with the applicable FCC rules and the Airman's Information Manual.

20. *Proposed Radio System* (*Issue* (*b*) (*6*)). Maier has bought two Narco VGTR–3A's. They are on its premises and would be used in the Unicom station if Maier receives the grant. The station could be on the air practically immediately. The control point would be in hangar No. 24. Mr. Maier has applied for a building permit to put up a 10′ x 20′ glass enclosure with telephone. He also hopes to provide Unicom service from the ramp area.

21. Cincinnati Aircraft operates its Unicom from hangar No. 5, which, as above written, is on the north side of the field opposite the Administration Building on Wilmer Avenue and on the same side of the field as the control tower. It does not plan to change the location of the control point.

22. *Availability of Radio Facilities to Other Fixed-Base Operators* (*Issue* (*b*) (*7*)). If Maier is the successful applicant, it will make a dispatch point available to others on request. (Cincinnati Aircraft contests a finding to this effect, citing Mr. Maier's testimony at Tr. 239 that he would have only one dispatch point. This, however, relates to his own facilities. At Tr. 267 he testified that he would "allow the establishment of a dispatch point by, say, Cincinnati Aircraft, if [he] were the successful applicant.") Cincinnatti Aircraft has no objection to making a dispatch point available to Maier, and feels that to do so would be a benefit to the airport.

23. *Unlicensed Operation* (*Issue Added by Review Board*). Queen City Flying Service, Inc., licensee of Aeronautical Advisory Station (Unicom) KRK 2, serving Lunken Airport, operated the station from hangar No. 5. It shared the hangar with Cincinnati Aircraft. On or about January 28, 1971, Queen City filed a petition in bankruptcy and ceased operating. Cincinnati Aircraft then began operating the station. Cincinnati did not seek a station transfer. The radio equipment was abandoned by the trustee in bankruptcy and Cincinnati acquired the transmitter through the abandonment. From January 28, 1971, until the Commission issued Special Temporary Authority on September 3, 1971, Cincinnati knew that it did not have a license to operate the station. There was confusion, however, in the minds of Cincinnati Aircraft personnel as to the power of the trustee in bankruptcy to confer operating authority for the Unicom. Mr. Gerwin, the former manager, who had been in charge until December 1971 (when Mr. Sust took over) testified to what it is evident was his own misunderstanding of the legal requirements in the operation of the Unicom, though the trustee in bankruptcy, after examining into the matter, realized that he could not transfer the license without Commission approval. There is no evidence that he informed Cincinnati Aircraft of his position, and it came as a pleasant surprise to Cincinnati Aircraft, just before it sent a telegram to the Commission for operating authority, that it need only make application. (The testimony on this point, however, can also be construed to imply that Cincinnati Aircraft, aware as it was that it had no license, had delayed

trying to obtain one because it thought it would face opposition.) Mr. Sust, the present manager, testified that the crucial revelation "came sometime just prior to this special temporary authority, and as best I can recall, it was at a point where it was indicated that neither the trustee nor the City of Cincinnati had any rights pertaining to the Unicom at Lunken Airport" (Tr. 434). Between the time it was decided that FCC authorization was necessary, and the actual receipt of the Special Temporary Authority, the Unicom was not shut down because, Mr. Sust testified, "[it] was, at least the opinion, that this was a vital necessary part of the airdrome" (Tr. 434). He did not think the fact of operation was "more important than the license" itself, but that "it was important from the standpoint of being able to serve the public," but he said that "[we] really didn't think of it in that context, at that time" (Tr. 434–435). Maier notes that only "after the application was made by Anthony Maier Enterprises, Inc. was any attempt made to get temporary authority" (reply, Par. 1).

Conclusions

24. The location of Cincinnati Aircraft is slightly superior to Maier's in that it affords better observation of the landing area and is closer to the control tower. As an FAA Flight Service Station and an Airdrome Control Service are available at Lunken Airport, the decisional significance of the advantage is diminished. Also, the advantage of a possible panoramic view of all landing strips from the inner station area is not as important in the airport advisory service as to a control station, since the advisory station does not "talk down" planes, and the operator who is asked by a pilot about the best landing strip need only step outside to inform himself.

25. Maier's primary operating hours are from 8 a.m. to 10 p.m., Cincinnati Aircraft's from 6 a.m. to 11 p.m. In addition, Cincinnati Aircraft has made arrangements to provide service on a 24-hour basis. Cincinnati Aircraft is preferred on this criterion.

26. Both applicants have sufficient competent personnel to operate an aeronautical advisory station during their normal working hours, so neither applicant is preferred.

27. Maier has been a fixed-base operator at Lunken Airport since 1964. Cincinnati Aircraft as a corporation has been at Lunken for many years, but the corporation has changed hands several times and there is little, if any, continuity of operation by the same personnel. Disregarding the corporate fiction of Cincinnati Aircraft, Maier's operation must be held the more stable, and it is preferred on the point.

28. Both applicants can with equal adequacy provide information on primary and secondary communications as specified in Rule 87.257.

29. The radio systems proposed by each applicant are standard. There appears to be no innovative plan by either party to warrant a preference of one over the other.

30. Both parties appear willing to offer the other dispatch point facilities. Accordingly, neither can claim a preference.

31. In the comparison complex the significance of Cincinnati Aircraft's operation of an unlicensed station must now be evaluated. It frankly admitted its error. Ordinarily, as the Bureau points out in its proposed conclusions (par. 8), Cincinnati Aircraft's "knowing" operation of an unlicensed station "would . . . give a strong decisional preference to the other applicant." The record, however, would not support a conclusion that Cincinnati Aircraft continued to operate the Unicom in flagrant disregard of the law; there was, as mentioned in the findings of fact, confusion about the ability of the trustee in bankruptcy to transfer Queen City's operating authority. In the circumstances it was no doubt a dangerous assumption by Cincinnati Aircraft that it could legally step into Queen City's shoes, as there had in any event been no *sale* by the trustee but merely an *abandonment* of the facility. Yet, though there was no special issue regarding Maier's unlicensed operation—and in the case of *disqualification* such an issue would be required (see *Lebanon Valley Radio, Inc.*, dissenting statement of Board Member Joseph N. Nelson, fn. 5,—F.C.C. 2d—, 24 RR 2d at 612), there is no inhibition against viewing Cincinnati Aircraft's *comparative* standing in light of Maier's own dereliction. The import of Cincinnati Aircraft's unlicensed operation is inevitably diminished, to the point that it does not significantly prejudice that applicant's comparative position, by Maier's violation. It has not been overlooked, in reaching this conclusion, that Cincinnati Aircraft may not have been overly eager to obtain an authoritative ruling on its unlicensed status because of a fear of stirring up opposition, nor that it had not sought Special Temporary Authority until Maier had filed its application. The effect of Maier's conduct in the appraisal of Cincinnati Aircraft's comparative standing is not lessened even if it is assumed, as Maier contends in its reply (Par. 6) (and applying an appropriate discount to the language of advocacy) that "the violation on the part of Anthony Maier Enterprises, Inc. was brought about, fostered, aided and abetted by Cincinnati Aircraft, Inc. operating the Unicom (123.0) for its own self-serving purposes and not impartially as called for by the rules and regulations of the Federal Communications Commission."

32. It can hardly be pretended that a choice in this relatively simple, though nonetheless important, service, can usually turn upon striking differences. Applicants will often have similar qualifications. Preferences may tend to be based on distinctions which are not in themselves marked, and a suspicion may almost arise that the stated reason for decision is a rationalization of an intuitional selection. But when, as just noted, it is understood that in the nature of things discrepancies can seldom be great, the necessity of basing the award upon seemingly trival ("insignificant" is the term used in its reply by Maier, Par. 8) grounds will immediately become apparent. The present case furnishes an example. The Bureau concedes that "[to] select one party over another is very difficult in this case—they are essentially equal," but it points out that "a selection is required" (proposed conclusions, Par. 8).

33. The decision comes down to this: Which of these factors is to be accorded controlling importance—the longer unbroken continuity in the rendition of service by Maier at Lunken Airport, or the longer service open hours of Cincinnati Aircraft? Of the two possible determinants, the latter, it must be held, is decisive. Cincinnati Aircraft has had several changes of ownership and has suffered financial difficulties, but there is nothing in the record to indicate that it will not continue operation for the foreseeable future, and while it operates the public will benefit from its longer hours. (Should it cease operations it may be predicted that Maier would try to fill the void.)

34. Accordingly, because public interest, convenience, and necessity will be served, IT IS ORDERED that unless an appeal from this Initial Decision is taken to the Commission by a party, or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the rules, the above-captioned application of Cincinnati Aircraft, Inc., for an aeronautical advisory station to serve the Lunken Airport, Cincinnati, Ohio, is GRANTED, and the application of Anthony Maier Enterprises, Inc. for the same facilities is DENIED. The grant to Cincinnati Aircraft is conditioned on its seasonably entering into good faith negotiations for a dispatch point with Maier.

FEDERAL COMMUNICATIONS COMMISSION,
HERBERT SHARFMAN, *Hearing Examiner.*

F.C.C. 72R–262

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of ATHENS BROADCASTING CO., INC., ATHENS, TENN. JOHN P. FREW AND JULIA N. FREW, D.B.A. 3 J'S BROADCASTING CO., ATHENS, TENN. For Construction Permits	Docket No. 17617 File No. BPH–5668 Docket No. 17618 File No. BPH–5768

MEMORANDUM OPINION AND ORDER

(Adopted September 22, 1972; Released September 28, 1972)

BY THE REVIEW BOARD: BERKEMEYER AND NELSON. BOARD MEMBER KESSLER CONCURRING IN THE RESULT ONLY.

1. This proceeding involves the mutually exclusive applications of Athens Broadcasting Company, Inc. (Athens Broadcasting) and John P. Frew and Julia N. Frew, d/b as 3 J's Broadcasting Company (3 J's), for authority to construct an FM broadcast station in Athens, Tennessee. Each of the applicants is presently the licensee of a standard broadcast station in Athens: daytime-only standard broadcast Station WYXI (1390 kHz, 500 w) is licensed to 3 J's; and unlimited time standard broadcast Station WLAR (1450 kHz, 1 kw, daytime, 250 w, nighttime) is licensed to Athens Broadcasting. The FM applications were designated for hearing in 1967 [1] on an air hazard issue against 3 J's and the standard comparative issue.[2] Since 1967, three separate hearings have been held and three Initial Decisions [3] and one Review Board Decision [4] have been released. All three Initial Decisions recommended a grant of the application of Athens Broadcasting, while the Board's Decision granted the application of 3 J's. On April 18, 1972, the Review Board heard oral argument on exceptions to the last two Initial Decisions. Recently, serious questions concerning the basic and comparative qualifications of Athens Broadcasting have been brought to the Board's attention. These questions are raised in several pleadings filed by the applicants and the Broadcast Bureau. The two major pleadings now before the Board are: (1) a petition for

[1] Order of the Chief of the Broadcast Bureau, acting under delegated authority, 32 FR 11712, published August 12, 1967.

[2] A site suitability issue against 3 J's was later added by the Review Board, by Memorandum Opinion and Order, 11 FCC 2d 559, 12 RR 2d 285, released February 5, 1968.

[3] Initial Decision of Hearing Examiner Thomas H. Donahue, 17 FCC 2d 458, 13 RR 2d 1217, released August 23, 1968; Cumulative Initial Decision of Hearing Examiner Donahue, FCC 70D–32, released July 29, 1970; and Supplemental Initial Decision of Hearing Examiner Ernest Nash, FCC 71D–32, released June 10, 1971. Examiner Nash was assigned to preside over this proceeding upon the retirement of Examiner Donahue.

[4] 17 FCC 2d 452, 16 RR 2d 638, released May 2, 1969.

leave to amend application, filed April 4, 1972, by Athens Broadcasting; [5] and (2) a petition to enlarge issues, filed August 3, 1972, by 3 J's.[6] Athens Broadcasting's petition to amend reflects a change in principals of the corporation and a change in management of the applicant's existing AM station (WLAR) and proposed FM station. 3 J's' petition to enlarge requests the addition of three issues against Athens Broadcasting, one inquiring into alleged violations of Sections 1.65 and 1.615 of the Commission's Rules, one inquiring into whether Athens Broadcasting and/or its principals filed "false or misleading statements" with the Commission, and a requisite and comparative qualifications issue.

BACKGROUND OF THE PROCEEDING

2. To facilitate a better understanding of our disposition of the pleadings, we will first set out a resume of the history of this proceeding. As noted above, the FM applications of Athens Broadcasting and 3 J's were designated for hearing in 1967 on, *inter alia*, the standard comparative issue. In his Initial Decision, released August 23, 1968 (note 3, *supra*), the Hearing Examiner recommended a grant of Athens Broadcasting's application on the basis of a comparative preference for more efficient use of the frequency, which he concluded outweighed an integration preference awarded to 3 J's. The Examiner rejected arguments that preferences be awarded in the categories of diversification of control of the media of mass communications, past broadcast record and duplication of programming.[7] On May 2, 1969, the Review Board released a Decision (note 4, *supra*), reversing the Examiner's recommendation and granting the application of 3 J's. The grant of 3 J's was awarded on the basis of: (1) a "slight" preference for diversification of media control because 3 J's operates a daytime-only standard broadcast station in Athens, while Athens Broadcasting is the licensee of a full-time standard broadcast facility in that community; and (2) a "substantial" preference for integration of ownership, due to 3 J's' plan to integrate 100% of its ownership into the operation of its station on a substantially full-time basis, while Athens Broadcasting proposed full-time integration of only its general manager and 10% stockholder, William P. Atkins.[8] The Board held that these

[5] Also before the Board are the following related pleadings: (a) notice of intention to amend application, filed March 31, 1972, by Athens Broadcasting; (b) motion for extension of time, filed April 10, 1972, by 3 J's; (c) motion to make more definite and certain, filed April 10, 1972, by 3 J's; (d) Broadcast Bureau's comments on petition for leave to amend application, filed April 12, 1972; (e) supplement to petition for leave to amend application, filed May 5, 1972, by Athens Broadcasting; (f) response to (e), filed May 8, 1972, by 3 J's; (g) second supplement to petition for leave to amend application, filed May 15, 1972, by Athens Broadcasting; (h) third supplement to petition for leave to amend application, filed May 25, 1972, by Athens Broadcasting; (i) comments on behalf of 3 J's, filed June 2, 1972; and (j) reply to (i), filed June 16, 1972, by Athens Broadcasting.

[6] Related pleadings before the Board are an opposition, filed August 16, 1972, by Athens Broadcasting; and the Broadcast Bureau's comments, filed August 16, 1972.

[7] In preferring Athens Broadcasting for a grant, the Examiner concluded that: "There is an element of conjecture in the assumption that integration of ownership into station operation begets sensitivity to changing area needs that is not present in the solid grounds for preference won by Athens Broadcasting." 17 FCC 2d at 474, 13 RR 2d at 1225. (Footnote omitted.)

[8] The April 4, 1972 petition for leave to amend application filed by Athens Broadcasting (paragraph 1, *supra*) reflects that Atkins, general manager of Station WLAR and proposed general manager of the applicant's FM station, and vice-president, director and ten percent stockholder of the applicant, has resigned and that Thomas A. Arterburn has assumed Atkins' corporate and operating positions and would purchase Atkins' 10% interest in the applicant. See paragraphs 5–11, *infra*.

preferences outweighed a "moderate" preference awarded to Athens Broadcasting for its more efficient utilization of the frequency, which was based on its greater coverage and lesser duplication of AM and FM programming.

3. On June 2, 1969, Athens Broadcasting filed with the Commission an application for review of the Board's Decision, requesting reversal of the Decision, or, in the alternative, that the case be remanded to the Examiner for further hearings on the past broadcast record of 3 J's. On January 26, 1970, the Commission released a Memorandum Opinion and Order (21 FCC 2d 161, 18 RR 2d 231) granting Athens Broadcasting's alternative request to reopen the record to adduce evidence under the comparative issue concerning 3 J's' past broadcast record, and directing the Examiner to prepare a Cumulative Initial Decision to cover all aspects of the proceeding. There was no request by Athens Broadcasting for a requisite qualifications issue against 3 J's and none was added. On July 29, 1970, the Hearing Examiner released his Cumulative Initial Decision (note 3, *supra*), in which he found that John Frew, 3 J's' co-owner: (1) induced the addition of a false jurat to a letter which was submitted to the Commission in violation of a United States criminal statute; (2) disseminated a misleading survey in connection with his standard broadcast station in Athens; (3) violated the Communications Act of 1934, as amended, and the Commission's Rules and Regulations by failing to reveal the correct sponsor of broadcast material; (4) engaged in at least three reporting failures in regard to the transfer of his interests in a number of broadcast stations; (5) failed to keep accurate logs for his Athens station in violation of the Commission's Rules; (6) advertised a lottery on his station in violation of law; and (7) failed to carry out many of the programming commitments on his Athens station. All of these findings led the Examiner to conclude that, assuming that 3 J's did enjoy a preference over Athens Broadcasting in the initial part of the proceeding, "it would shock credulity to arrive at any other ultimate conclusion than that the very substantial array of deviations from the norm of sound licenseeship . . . outweigh, on [Athens Broadcasting's] side, the comparatively negligible preferences awarded 3 J's by the Review Board."

4. Then, in response to a petition to enlarge issues, filed September 30, 1970, by 3 J's, the Review Board, by Memorandum Opinion and Order, released January 14, 1971 (27 FCC 2d 7, 20 RR 2d 1115), reopened the record and remanded the proceeding to the Examiner for the adduction of evidence on additional issue to determine: first, whether Athens Broadcasting misrepresented the coverage area and contours of its AM radio station in Athens on promotional maps; second, whether Athens Broadcasting has kept its radio tower lighted in accordance with the terms of its license and Commission Rules; and, third, in light of the evidence adduced pursuant to the added issues, the effect on Athens Broadcasting's basic and/or comparative qualifications. On June 10, 1971, Hearing Examiner Ernest Nash released a Supplemental Initial Decision (note 3, *supra*) concluding that the record on remand "present[s] no more than trifling examples of licensee misfeasance" which cannot be accorded weight in deter-

mining which application should be granted. Therefore, the Examiner determined that the evidence on remand did not affect the recommended grant to Athens Broadcasting in the Cumulative Initial Decision. Exceptions to both the Cumulative and Supplemental Initial Decisions have been filed [9] and the case was ripe for Decision at the time of the oral argument in April of this year. Then, the pleadings referred to in paragraph 1, *supra*, were filed. We will now proceed to a discussion of Athens Broadcasting's amendment, 3 J's' petition to enlarge, and 3 J's' past broadcast record.

PETITION FOR LEAVE TO AMEND

5. Athens Broadcasting's petition for leave to amend application was filed four days after the applicant filed a "notice of intention to amend application." See note 5, *supra*. The "notice" advised the Board that "it will be necessary within the next several days" [10] to file a petition to amend to reflect the fact that William P. Atkins "will no longer be a stockholder of the applicant and will not be the general manager of the proposed new FM station." The "notice" further advised the Board that the amendment "will be filed as soon as it is received from the applicant." Finally, the "notice" states that: "It is contemplated that Mr. Atkins' [10%] interest in the applicant will be acquired by Mr. Thomas Arterburn who will replace Mr. Atkins as the general manager of the proposed new FM station." Arterburn is not identified in the "notice" or in the petition for leave to amend. The petition states that the amendment is necessary because Atkins resigned from his positions as officer, director, stockholder and general manager and was replaced by Arterburn who, "when present plans are realized", will become a 14.16% stockholder of the applicant. It is not explained in the petition (or in the earlier "notice") how Arterburn can become a 14.16% stockholder by purchasing Atkins' 10% stock interest.

6. In its motion to make more definite and certain, filed April 10, 1972, 3 J's states that it cannot respond properly to the petition to amend until the applicant provides further information concerning Arterburn, *i.e.*, biographical data in response to Section II of FCC Form 301.[11] According to 3 J's, "An applicant on Form 301 must answer *all* questions in Section II in regard to each and every principal. These are important questions, and the requirement cannot be evaded by slipping in someone new at a subsequent date by way of amendment, without *any* information on his qualifications." [12]

7. The Broadcast Bureau opposes Athens Broadcasting's petition for leave to amend on the ground that acceptance of the amendment

[9] 3 J's filed exceptions to both Initial Decisions; Athens Broadcasting filed limited exceptions to the Cumulative Initial Decision; and the Broadcast Bureau filed exceptions to the Supplemental Initial Decision.

[10] At the time the "notice" was filed, oral argument on exceptions to the Cumulative and Supplemental Initial Decisions had already been scheduled for April 18, 1972, FCC 72R–77, released March 29, 1972.

[11] On the same day it filed its motion to make more definite and certain, 3 J's also filed a motion for extension of time within which to file a response to Athens Broadcasting's petition. In view of our dispositions of Athens Broadcasting's petition to amend and 3 J's' petition to enlarge, *infra*, 3 J's' motions of April 10, 1972 will be dismissed as moot.

[12] In its comments, filed June 2, 1972, 3 J's states that it has "no objection" to the acceptance of the amendment as supplemented.

would result in the applicant obtaining a comparative advantage over its competitor, 3 J's. In the Bureau's opinion, it would be "totally inappropriate" to allow Athens Broadcasting to improve its competitive posture "at this late stage" of the proceeding. The Bureau acknowledges that "disallowing [the] amendment will result in a fiction * * *. [however,] it is preferable to accept a fiction as compared to the administrative chaos that would result if amendments of this type are permitted." Finally, the Bureau maintains that while Athens Broadcasting was required by Section 1.65 of the Commission's Rules to report Atkins' resignation, that section was not intended to allow post-designation amendments which would improve an applicant's comparative position.

8. The three supplements to the petition for leave to amend [13] disclose, among other things, that Thomas Arterburn is the son of Helen F. Arterburn, Athens Broadcasting's majority stockholder; [14] that Thomas and his brother, Donald, each became 4.16% stockholders of the corporation on July 2, 1971; that they received their shares of stock as gifts from their mother; [15] that the Arterburn brothers became officers and directors [16] of the corporation on February 20, 1972; [17] that Thomas Arterburn became general manager of Station WLAR on February 20, 1972; that Thomas Arterburn purchased William Atkins' 10% stock interest on April 28, 1972; and that Thomas Arterburn filed a petition for bankruptcy in the United States District Court, Chattanooga, Tennessee, on July 16, 1970 [18] mainly, the applicant represented, because of "medical bills incurred as a result of an operation undergone by his wife in [sic] September 18, 1969." In its second supplement, filed May 15, 1972, Athens Broadcasting states that it failed to report the gift of stock made on July 2, 1971 to the Arterburn brothers because Mrs. Arterburn "did not realize that it was necessary to report the transfer of stock to the Commission and since no dividends have ever been paid on the applicant's stock, Mr. Atkins did not realize a change in ownership report was required involving the gift of such a few shares to members of the stockholders' family."

9. Athens Broadcasting's petition for leave to amend will be denied and the amendment attached thereto will be rejected. Section 1.522 of the Commission's Rules provides, in part, that requests to amend an application after it has been designated for hearing will be granted only for "good cause" shown. In satisfying the "good cause" criteria for post-designation amendments, the moving party must demonstrate that it acted with due diligence; that the proposed amendment was

[13] The supplements were filed on May 5, 15, and 25, 1972, respectively. See note 5, *supra*.

[14] When the record in this proceeding was closed, Mrs. Arterburn owned 90% of the stock and William Atkins owned 10%.

[15] The gifts of stock to Thomas and Donald Arterburn were first disclosed by counsel for Athens Broadcasting at the April 18, 1972 oral argument. Counsel stated: "To the best of my knowledge, Mrs. Arterburn * * * gave five shares of stock to each of her sons. * * * I am not sure [when she made the gifts.] I believe it was late last summer." Tr. 871–872. The exact date and other details concerning the gifts were disclosd for the first time in the May 5, 1972 supplement.

[16] Thomas Arterburn became vice-president and director and Donald Arterburn became secretary-treasurer and director.

[17] These facts were first reported to the Commission on May 5, 1972.

[18] The fact of Arterburn's bankruptcy was first disclosed to the Commission on May 15, 1972. A more complete statement of the alleged circumstances surrounding the bankruptcy was submitted on May 25, 1972.

not required by the voluntary act of the applicant; that no modification or addition of issues or parties would be necessitated; that the proposed amendment would not disrupt the orderly conduct of the hearing or necessitate additional hearing; that the other parties will not be unfairly prejudiced; and that the applicant will not gain a competitive advantage. *Erwin O'Connor Broadcasting Co.*, 22 FCC 2d 140, 143, 18 RR 2d 820, 824 (1970). See *Sands Broadcasting Corp.*, FCC 61M–1218, 22 RR 106. Athens Broadcasting's petition does not meet any of the above criteria.

10. First, Athens Broadcasting has not acted with "due diligence" in submitting its amendment. Most of the events reported in the petition, as supplemented, transpired in February of this year, while they came to the Board's attention in piecemeal fashion months later. See paragraphs 5, 6, and 8, *supra*. In this regard, the Arterburn brothers became stockholders of the applicant in July, 1971 and this fact was not properly reported until May, 1972. See note 15, *supra*. Moreover, it was *after* 3 J's filed its requests for clarification that the applicant submitted further necessary information concerning Thomas Arterburn. Under these circumstances, we cannot conclude that Athens Broadcasting acted with "due diligence". Second, the applicant has failed to show that the amendment was not required by its own voluntary act. The circumstances surrounding Atkins' resignation from his various positions at Athens Broadcasting are not explained. In fact, the date of his resignation is not even disclosed. The burden was on Athens Broadcasting to make such a showing and in its absence we do not know whether the amendment was necessitated by the applicant's own voluntary act. In this regard, we note that Atkins, as general manager of Athens Broadcasting's AM station, was responsible for the rate card and tower lighting incidents referred to in paragraph 4, *supra*. Therefore, the applicant's glaring failure to disclose the circumstances surrounding his departure at this late date in the proceeding—and after eighteen years of employment at the station—raise serious questions about the applicant's candor and motivations. See paragraph 21, *infra*. Third, acceptance of the amendment might require the modification or addition of issues or parties; however, because we do not know the circumstances behind Atkins' resignation, it is impossible to determine whether Athens Broadcasting satisfied this criterion. We note that it was the petitioner's obligation to make the required showing and its failure to do so is merely one of several factors leading us to the conclusion that the petition to amend must be denied.

11. Fourth, the proposed amendment would disrupt the orderly conduct of the hearing because it would necessitate an evidentiary inquiry under the standard comparative issue into the qualifications of Thomas Arterburn, who proposes to serve as general manager of Athens Broadcasting's FM station.[19] The fact that further issues are being added against Athens Broadcasting (see paragraph 27, *infra*) does not justify acceptance of the amendment because: (1) it would unnecessarily further prolong an already long-protracted proceeding;

[19] In our May, 1969 Decision, *supra*, Athens Broadcasting received credit for the proposed full-time participation of William Atkins as general manager of the FM station. His participation was qualitatively enhanced by his local residence, civic participation and broadcast experience. See 17 FCC 2d at 457, 16 RR 2d at 645.

and (2) it would be in disregard of the fact that Athens Broadcasting would be gaining an unwarranted competitive advantage over 3 J's, which is the final—and perhaps the most important—reason for denying the petition. "Post-designation amendments attempting to substitute principals have not been looked upon with favor by the Commission where . . . such amendments would result in the amending party gaining a comparative advantage." *Chapman Radio and Television Co.*, 26 FCC 2d 891, 893, 20 RR 2d 977, 979 (1970), citing *The News-Sun Broadcasting Co.*, 24 FCC 2d 770, 19 RR 2d 942 (1970); and *Grayson Television Co.*, 11 FCC 2d 881, 12 RR 2d 512 (1968). In this case, since the new general manager, Thomas Arterburn, would be a 14.16% stockholder, while his predecessor, William Atkins, had only a 10% interest, to accept the amendment would improperly permit it to improve its comparative position at this late date in the proceeding. While the improvement might be slight, there is, in our view, "a reasonable possibility that the amendment could result in a comparative advantage" for Athens Broadcasting. *Great River Broadcasting, Inc.*, 12 FCC 2d 35, 36, 12 RR 2d 659, 661 (1968). This would be grossly unfair to 3 J's. As the Bureau points out, rejection of Athens Broadcasting's amendment means that we must proceed with the "fiction" that Atkins remains a 10% stockholder integrated into the operation of the proposed station (but see note 34, *infra*), and that the applicant will receive credit for integration only on that basis. However, "such a result is to be preferred when the integrity of the Commission's Rules and of its processes is at stake." *Martin Lake Broadcasting Co.*, 26 FCC 2d 963, 970, 20 RR 2d 964, 974 (1970). See *Grayson Television Co., supra*. In sum, Athens Broadcasting's petition for leave to amend must be denied because the applicant has failed to show "good cause" for acceptance of the amendment.

PETITION TO ENLARGE ISSUES

12. In its petition to enlarge issues, 3 J's requests the addition of the following three issues against Athens Broadcasting:

1. To determine whether Athens Broadcasting Company, Inc. complied with the provisions of Sections 1.65 and 1.615 of the Rules, and if not, the facts and circumstances surrounding such failure to comply.
2. To determine whether Athens Broadcasting Company, Inc. and/or its principals filed false or misleading statements with the Commission in this proceeding, and if so, the facts and circumstances thereof.
3. To determine the effect of the conduct of Athens Broadcasting Company, Inc., as shown by the evidence under the foregoing issues, upon its comparative and absolute qualifications.

The gist of the petition is that Athens Broadcasting has failed to comply with the reporting requirements of Sections 1.65 and 1.615 of the Commission's Rules and has not explained its failure to do so. The alleged violations concern the disclosures made by Athens Broadcasting in its petition to amend, as supplemented. 3 J's also alleges that ever since Athens Broadcasting filed its "notice of intention to amend application" (see paragraph 5, *supra*), it has been "guilty of evasiveness and lack of candor in reporting the circumstances surrounding the filings". At the outset, 3 J's states that it filed the instant petition

"out of an abundance caution" because it believes that the facts alleged in its petition may be considered under the present comparative issue. In this regard, petitioner notes that in its comments, filed June 2, 1972 (note 5, *supra*), it requested the Board to set a date upon which supplemental proposed findings and conclusions would be filed by the parties based upon the various pleadings filed by Athens Broadcasting and 3 J's in connection with the former's petition to amend. The earlier comments essentially dealt with the question of Athens Broadcasting's candor in reporting the matter of Thomas Arterburn's 1970 bankruptcy petition. See paragraph 8, *supra*. The instant petition repeats and amplifies that allegation and, in addition, argues that Athens Broadcasting violated two of the Commission's reporting rules.

13. In support of its request for the first issue, 3 J's alleges: (1) that Athens Broadcasting failed to report to the Commission until April 18, 1972, the transfer in July, 1971 of ten shares of the applicant's stock from Helen Arterburn (90% owner) to her two sons who, prior to the transfer, held no stock in the applicant; and (2) that Athens Broadcasting failed to timely report to the Commission the change in the applicant's proposal that its 10% stockholder, William Atkins, would be general manager of its proposed FM station. See paragraph 8, *supra*. According to 3 J's, "it is clear" that Athens Broadcasting has violated Commission Rules 1.65 and 1.615 [20] and an appropriate issue must therefore be added. The second requested issue stems from statements made by the applicant and Thomas Arterburn in the May 25, 1972 supplement (paragraph 8, *supra*) concerning Arterburn's bankruptcy petition. The supplement represents that, at the time the petition in bankruptcy was filed, Arterburn had net assets of $1,000 and liabilities of approximately $12,800; that the "great majority of the liabilities stemmed from medical bills incurred as a result of an operation undergone by his wife in September 18, 1969"; and that the hospital had threatened to file suit to collect $4,100 which Arterburn's insurance company refused to pay. The supplement claimed that the information provided was "a full explanation" and that the applicant's obligation to inform the Commission of changes in its application was "complete[d]". 3 J's notes, however, that attached to its comments, filed June 2, 1972, was a copy of Arterburn's bankruptcy petition, which, 3 J's contends, indicates, contrary to Arterburn's sworn statement, that Arterburn's two largest creditors were banks and that bills due hospitals constituted a very small portion of Arterburn's debts.[21] 3 J's further argues that, "faced with this evidence" (*i.e.*, 3 J's comments), Arterburn filed another affidavit on June 16, 1972,[22] in which he admitted that the bill for his wife's operation was only $947.56, but

[20] Rule 1.65 requires disclosure when the information furnished in an application is no longer substantially accurate and complete in all significant respects or when changes which may be of decisional significance have occurred. Rule 1.615 provides, in part, that: (c) A supplemental Ownership Report (FCC Form 323) shall be filed by each licensee or permittee within 30 days after any change occurs in the information required by the Ownership Report from that previously reported. Such report shall include without limitation: (1) Any change in capitalization or organization; (2) Any change in officers and directors; (3) Any transaction affecting the ownership, direct or indirect, or voting rights of licensee's or permittee's stock, such as: (i) A transfer of stock. * * *

[21] According to the bankruptcy petition, Arterburn owed a total of $1,233.78 to three hospitals.

[22] The affidavit is attached to Athens Broadcasting's reply to comments on 3 J's, filed June 16, 1972. See note 5, *supra*.

claimed that "other costs stemming from his wife's illness and listed in the bankruptcy petition totalled about $1,000. . . ." In 3 J's view, Arterburn's explanation of May 25, 1972 that the "great majority of the liabilities stemmed from medical bills incurred as a result of the operation", was, in 3 J's words, "not true". And, 3 J's continues, also "not true" was the figure of $4,000 for the operation. In sum, 3 J's concludes that Athens Broadcasting has been "guilty of evasiveness and lack of candor"; that Athens Broadcasting has supplied information concerning Arterburn's bankruptcy "only as a result of constant nudging by 3 J's"; and that the information supplied was "inaccurate".

14. The Broadcast Bureau supports 3 J's request for a Rule 1.65-Rule 1.615 issue. The Bureau maintains that the Commission must be able to rely upon broadcast licensees and applicants to comply with the reporting rules. In the Bureau's opinion, Athens Broadcasting was "clearly * * * remiss in failing to report July, 1971, ownership transfers until May, 1972." The failure to report the transfers until May, 1972 is characterized by the Bureau as a "blatant disregard of Commission Rules". The Bureau also supports addition of the second requested issue, "but for comparative purposes only". The Bureau does not believe that the inaccuracies in reporting Arterburn's bankruptcy involve factual matters of significance.

15. Athens Broadcasting bases its opposition to 3 J's' petition on two major arguments: (1) that the petition is untimely and should be dismissed without further consideration; and (2) that the factual allegations are insufficient to warrant addition of the requested issues. With regard to timeliness, respondent argues that "all of the facts" relied upon by 3 J's have been on file with the Commission for more than sixty days, and that 3 J's has therefore violated the timeliness requirement of Commission Rule 1.229(b). Respondent then notes the age of this proceeding (the applications were designated for hearing in August, 1967); the fact that 3 J's failed to plead good cause for the filing of an earlier petition to enlarge issues against Athens Broadcasting;[23] and the doctrine of administrative finality (citing *Greater Boston Television Corp.* v. *FCC*, —— U.S. App. D.C. ——, — F.2d ——, 23 RR 2d 2055 (1972)). Athens Broadcasting contends that, "Surely, five years is a sufficient time period in which to select a licensee for the only FM station allocated to a city of 12,000 people." On the merits, Athens Broadcasting first concedes that it violated Sections 1.65 and 1.615 of the Rules. However, it insists that the failure to report the stock transfers from Mrs. Arterburn to her two sons was "isolated" and "minor" and does not affect its basic or comparative qualifications. According to respondent: (1) the stock transfer did not constitute a transfer of control; (2) "no principal of the applicant was aware of the Commisison's requirement that the transfer be reported until March of 1972" (see paragraph 8, *supra*); (3) there was no motive to conceal the stock transfer because it has no effect on the applicant's qualifications; and (4) the change in ownership was voluntarily re-

[23] Despite 3 J's' "inexcusable" failure to plead good cause for the late filing of its September 30, 1970 petition, the Board granted it and added three potentially disqualifying issues against Athens Broadcasting because of "the very serious public interest questions raised." See paragraph 4, *supra*.

ported to the Commission before any questions concerning it were raised. For these reasons, Athens Broadcasting argues, 3 J's' petition must be denied. In support, respondent cites several Commission and Review Board cases in which requests to add Rule 1.65 issues were denied.[24]

16. Next, Athens Broadcasting maintains that the delay in reporting the change in general manager is "obviously '*de-minimus*' ". Again, respondent relies on its voluntary disclosure of the change and the cases cited in regard to the stock transfer (note 24, *supra*). Finally, with respect to the applicant's and Thomas Arterburn's representations concerning the bankruptcy, Athens Broadcasting submits that the conceded inconsistencies between Arterburn's first affidavit [25] and the bankruptcy petition [26] are "minor" and "immaterial to the question of which * * * [applicant] will better serve the public interest." Respondent points out that it voluntarily reported the bankruptcy before another party brought it to the Commission's attention and argues that Arterburn's affidavit was "obviously prepared in a hurried manner in order to report the bankruptcy". Athens Broadcasting states that the same type of "uintentional mistakes" were dismissed by the Commission in *Emerald Broadcasting Co.*, 30 FCC 2d 879, 22 RR 2d 633 (1971), and that the Board should follow the *Emerald* precedent and deny 3 J's' petition.

17. At the outset, we cannot agree with Athens Broadcasting that 3 J's' petition should be dismissed out-of-hand without consideration of the merits. This argument is based on the misplaced contention that the petition is untimely under Commission Rule 1.229(b). Contrary to Athens Broadcasting's assertions, 3 J's has shown good cause for the delay in filing its petition.[27] 3 J's notes at the very beginning of its petition that it filed the request "out of an abundance of caution" in view of its earlier comments requesting the Board to set a date for the filing of supplementary findings and conclusions on the subject of Athens Broadcasting's candor. See paragraph 12, *supra*. Ever since Athens Broadcasting filed its "notice of intention to amend application" on March 31, 1972, 3 J's has consistently requested Athens Broadcasting to supply complete and accurate information concerning the amendment. See note 5, *supra*. See also paragraph 6, *supra*. Athens Broadcasting responded to these requests by submitting no less than three supplements to its petition for leave to amend, which, in turn, was preceded by its March 31st "notice". While 3 J's may have chosen an inappropriate form of relief in originally requesting the Board to set a date for the filing of supplementary proposed findings and conclusions,[28] it was not, under the circumstances, dilatory in requesting

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[24] *Greenfield Broadcasting Corp.*, 30 FCC 2d 774, 22 RR 2d 497 (1971); *Channel 41, Inc.*, 24 FCC 2d 603, 19 RR 2d 879 (1970); *The Big Chief*, 29 FCC 2d 154, 21 RR 2d 971 (1971); *Lamar Life Broadcasting Co.*, 27 FCC 2d 224, 20 RR 2d 1162 (1971); *Media, Inc.*, 22 FCC 2d 486, 18 RR 2d 970 (1970); *Georgia Radio, Inc.*, 19 FCC 2d 779, 17 RR 2d 330 (1969); *Sumiton Broadcasting Co., Inc.*, 14 FCC 2d 208, 13 RR 2d 1086 (1968).

[25] Arterburn's affidavit is attached to Athens Broadcasting's third supplement to its petition for leave to amend, filed May 25, 1972.

[26] A copy of the bankruptcy petition is attached to 3 J's' comments, filed June 2, 1972.

[27] Compare our earlier Memorandum Opinion and Order, *supra*, 27 FCC 2d 7, 20 RR 2d 1115, where we held that good cause for the late-filing of 3 J's' September, 1970 petition to enlarge issues had not been shown.

[28] See paragraph 6, *supra*. In view of our determination herein to add issues against Athens Broadcasting, we need not rule on 3 J's' earlier request.

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enlargement of the issues by the Review Board on August 3rd. However, even if the petition was not timely filed, we would consider the petition on our own motion because 3 J's allegations "present serious public interest considerations which merit our attention." *DuPage County Broadcasting, Inc.*, 21 FCC 2d 395, 397, 18 RR 2d 321, 324, reconsideration granted in part and denied in part 23 FCC 2d 22, 19 RR 2d 568 (1970). See *Charles W. Jobbins*, 29 FCC 2d 849, 21 RR 2d 1205 (1971); *The Edgefield-Saluda Radio Co.* (*WJES*), 5 FCC 2d 148, 8 RR 2d 611 (1966).

18. There is no question that Athens Broadcasting has violated Sections 1.65 and 1.615 of the Commission's Rules. The applicant admits as much. The question for us to determine is whether the violations are serious enough to warrant the addition of hearing issues inquiring into the violations. Addition of issues against Athens Broadcasting would necessarily entail a reopening of the record and a remand for further hearing in this already long-protracted proceeding. In this regard, we are aware of the doctrine of administrative finality and the important public policy of "orderliness, expedition, and finality in the adjudicating process." *Valley Telecasting Co.* v. *FCC*, 118 U.S. App. D.C. 410, 413, 336 F.2d 914, 917, 2 RR 2d 2064, 2068 (1964). However, the doctrine is not a bar to a remand where the public interest demands a further hearing on the qualifications of a potential broadcast licensee. After all, "there is a public interest in administrative finality" *and* a "public interest" in the "selection of optimum applicants" for broadcast facilities. *Greater Boston Television Corp.* v. *FCC*, *supra*, —— U.S. App. D.C. at ——, — F.2d at ——, 23 RR 2d at 2074.[29] The question in each case where the conflict arises is whether the need for finality outweighs the need for further hearing. *Valley Telecasting Co.* v. *FCC*, *supra*. *Cf. Kidd* v. *FCC*, 112 U.S. App. D.C. 288, 302 F.2d 873, 22 RR 2065 (1962); *The News-Sun Broadcasting Co.*, 27 FCC 2d 61, 20 RR 2d 1084 (1970). Unnecessarily prolonged hearings are, *ipso facto*, not in the public interest. However, "merely because a further hearing will delay a final grant does not relieve the Commission of the obligation to make reasonably certain that the prospective broadcast licensee will operate the facility responsibly and in the public interest." *DuPage County Broadcasting, Inc.*, *supra*, 23 FCC 2d at 25, 19 RR 2d at 572.[30] We believe that serious questions have been raised

[29] *Greater Boston* is cited by Athens Broadcasting in support of its argument that 3 J's' petition should be dismissed out-of-hand. *Greater Boston* was a novel case involving a Commission request to the Court of Appeals to recall its mandate affirming the Commission's Order awarding a television station construction permit to one of the applicants in the Boston, Massachusetts, Channel 5 proceeding. In a lengthy decision (the slip opinion is 43 pages long), the Court ultimately decided not to recall its mandate. While the Court did speak of the "public interest in administrative finality", it also stated that the "finality [of a final administrative decision which has been reviewed and affirmed on court appeal] is dominant *but not absolute*. . . . [D]octrines deeply rooted in equity jurisprudence permit a recall of an appellate mandate of affirmance to avoid an unconscionable justice growing out of misconduct undercutting the integrity of the administrative or judicial process". —— U.S. App. D.C. at ——, — F.2d at ——, 23 RR 2d at 2081. (Emphasis added.)

[30] In *DuPage County*, the urgency for a final grant and the concomitant undesirability of a further hearing was, if anything, greater than the need at this time for a final grant in this case. In *DuPage*, two applicants were competing for Commission authorization to construct new standard broadcast stations in two Illinois communities. Consequently, a 307(b) determination had to be made. Neither community had a local commercial broadcast service; and each had a population of approximately 26,000 persons and 40,000 persons, respectively. Yet, despite the obvious need for a local broadcast outlet, the Commission rejected the argument that "the remand proceeding will seriously delay a needed first local transmission facility . . . and effectuation of the Section 307(b) mandate will thereby

as to whether Athens Broadcasting "will operate the [proposed Athens FM] facility responsibly and in the public interest."

19. In this case, we are confronted not simply with a situation involving an inexperienced broadcast applicant who, in an isolated instance, failed to comply with the Commission's reporting rules, but with an applicant for a second broadcast facility which has been a licensee for several years, which has always been represented by experienced communications counsel, and which has, among other things, admittedly violated two reporting rules. Of course, *all* applicants (novices and licensees alike) are expected to comply with the Commission's Rules and Regulations; when an existing licensee fails to do so, however, it raises questions of "licensee responsibility expected of the operator of a broadcast facility." *DuPage County Broadcasting, Inc., supra.* 21 FCC 2d at 398, 18 RR 2d at 325. In our opinion, Athens Broadcasting's violations of Rules 1.65 and 1.615 in failing to report until April, 1972, the July, 1971, transfers of stock from Helen Arterburn to her two sons are not, as the applicant argues, "minor" and "isolated". To the contrary, they are serious, and, when viewed in the context of the evidence already adduced in this case with regard to the "rate card" and "tower lighting" incidents (paragraph 4, *supra*), indicate the possibility of a pattern of carelessness and ineptitude by the applicant, an existing broadcast licensee. Compare *Emerald Broadcasting Co., supra.* None of the excuses afforded by the applicant mitigate the violations. The fact that the stock transfers did not constitute a transfer of control does not mitigate the significance of the violation. *All* stock transfers must be reported within thirty days, whether or not they involve a transfer of control.[31] Next, the plea by the applicant (a broadcast licensee for several years), that "no principal of the applicant was aware of the Commission's requirements that the transfer be reported", indicates either ineptness and carelessness on the part of the applicant's principals, which would warrant an evidentiary inquiry in the particular circumstances of this case, or intentional misrepresentation, which would also warrant a further hearing. In this regard, we note that William Atkins, principal of the applicant and the general manager of its station until February of this year, has been involved in broadcasting for over twenty years. He became general manager of WLAR in 1957. In fact, Athens Broadcasting, in its exceptions to the first Initial Decision in this proceeding, vigorously argued that Atkins' experience in broadcasting was comparatively superior to that of John Frew, co-owner and general manager of 3 J's' station (WYXI). In addition, the applicant stated in its application for the FM station that it keeps on hand an up-to-date copy of the Commission's Rules and Regulations.

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be thwarted for an indefinite period." 23 FCC 2d at 23, 19 RR 2d at 570. Athens has a population of 12,103 persons (1960 U.S. Census) and *two* local broadcast outlets (3 J's' WYXI and Athens Broadcasting's WLAR). We do not mean to suggest that there is no need for a *third* broadcast outlet in Athens, but if the Commission could determine that a remand and further hearing was necessary in *DuPage*, we can certainly do the same here. Finally, we note that while this proceeding is now over five years old (see paragraph 1, *supra*), the *DuPage* case was designated for hearing on November 7, 1966, and the Commission's remand Order was released on February 13, 1970, following a Review Board Decision released August 29, 1969 (19 FCC 2d 250, 17 RR 2d 229).

[31] Rule 1.615 clearly states that a supplemental ownership report "shall include *without limitation* * * * *any* transaction affecting the ownership, direct or indirect, or voting rights of licensee's * * * stock, such as * * * a transfer of stock. * * *" (Emphasis added.)

If the applicant had consulted its copy of the Commission's Rules and Regulations which it states it had on hand—or sought the advice of its experienced communications counsel—it would have discovered that it was required to report the stock transfers. In light of all of these facts, it is difficult to accept Athens Broadcasting's claim that its principals are ignorant of the Commission's Rules and Regulations. In any event, this claim and others should be examined at an evidentiary hearing.

20. Third, although there may have been no "motive" to conceal the stock transfer, "there still remains the problem . . . that the applicant may be so inept and careless that it should not be entrusted with [another] license." *Beamon Advertising, Inc.*, 1 RR 2d 285, 289, review denied FCC 63–1182, released December 27, 1963. In this regard, we believe it to be significant that the applicant failed to report the transfer for nearly one year when it had to be reported within thirty days.[32] Finally, the fact that Athens Broadcasting voluntarily disclosed the change in ownership before another party discovered it is relevant, but does not excuse the violation. All of the cases cited by Athens Broadcasting in support of its position (note 24, *supra*) are clearly distinguishable. While all the cases differ on the facts, the common thread running through them is the isolated nature of the rule violation and the clear absence of a motive for concealment. In this case, the applicant concedes that it violated *two* Commission Rules and the rules violations are clearly not isolated. Serious questions have already been raised in this proceeding concerning Athens Broadcasting's failure to accurately depict the 0.5 mv/m contour of its AM station on a rate card distributed for several years to advertisers and its failure to comply with the Commission's Rules and Regulations with respect to tower lights. See our prior Memorandum Opinion and Order, *supra*, 27 FCC 2d 7, 20 RR 2d 1115. A hearing has been held on those issues and a Supplemental Initial Decision, excusing the applicant's conduct, has been released. See paragraph 4, *supra*. We need not decide now whether Athens Broadcasting is disqualified under the issues added in our prior Memorandum Opinion and Order. The point is that in addition to the serious questions raised by 3 J's in 1970 concerning Athens Broadcasting's basic qualifications, *more* serious questions have now been raised concerning the applicant's qualifications.

21. The failure to report the stock transfers for almost one year is a serious matter. While the delay of a few days in reporting the corporate and managerial changes that occurred in February, 1972, may not be as blatant, it does indicate a "pattern of carelessness and inadvertence",[33] at least when viewed in the context of the failure to report the stock transfers. The "rate card" and "tower lighting" incidents provide further indication of a "pattern". Moreover, Athens Broadcasting has not revealed any of the facts and circumstances surrounding William Atkins' departure from the applicant. Atkins

[32] While the transfer was voluntarily brought to the Board's attention on April 18, 1972, it was disclosed in haphazard fashion without any details. The first genuine report of the transfer was on May 5, 1972. See note 15, *supra*.

[33] *Folkways Broadcasting Co., Inc.*, 26 FCC 2d 176, 179, 20 RR 2d 528, 534 (1970). See *Beamon Advertising, Inc., supra*.

was the general manager of Station WLAR at the time of the rate card and tower lighting incidents. His candor at the third hearing has been called into question by both 3 J's and the Broadcast Bureau. Significantly, he was general manager of WLAR and an officer, director and stockholder when Mrs. Arterburn gave ten shares of her stock in the corporation to her sons. Therefore, an inquiry under the issues being added herein should also include the subject of Atkins' departure.[34]

22. Finally, we believe that the inconsistencies between Athens Broadcasting's third supplement to its petition for leave to amend and Thomas Arterburn's petition in bankruptcy, reveal, at least, a case of confusion and carelessness in reporting the details of the bankruptcy proceeding to the Commission. Certainly, it was inaccurate for Arterburn—who was, after all, the bankrupt who petitioned for relief—to state, without reservation, that the "great majority of the liabilities stemmed from medical bills incurred as a result of [his wife's] operation." As 3 J's notes in its petition (and in its earlier comments, filed June 2, 1972), a copy of the bankruptcy petition shows that medical bills accounted for only a small portion of Arterburn's debts. They did not constitute a "great majority" of the debts, as Arterburn represented, but only a small minority. The majority of the liabilities were business debts. Yet, in the applicant's third supplement to its petition to amend, Arterburn "certif[ied] that the above statement was "true, complete and correct to the best of his knowledge and belief and [was] made in good faith". Arterburn's explanation for the inconsistency—that "at the time he prepared the amendment * * * he did not have a copy of the petition for bankruptcy * * * but relied upon his memory when estimating the size of the hospital bill"—indicates that Arterburn was careless in the preparation of his affidavit and underscores the need for a hearing on Athens Broadcasting's qualifications to be the licensee of another radio station. It is well established that the Commission must rely on its licensees for complete and accurate information. This is the basic cornerstone of efficient government regulation. *Cf.* Report and Order on *Reporting of Changed Circumstances*, 29 FR 15516, 3 RR 2d 1622 (1964). Here, it was only after 3 J's submitted comments on Athens Broadcasting's third supplement, that the applicant—an existing broadcast licensee—supplied the "true, complete and correct" information on the bankruptcy. In view of the apparent carelessness and ineptness in connection with the reporting failures noted above, and also in light of the tower lighting incident, we will add appropriate issues against Athens Broadcasting. *Beamon Advertising, Inc., supra. Cf. Marvin C. Hanz*, 22 FCC 2d 147, 18 RR 2d 830 (1970), review denied FCC 70–724, released July 13, 1970. The questions of misrepresentation and lack of candor will also be included because of the number of non-dis-

[34] We have denied Athens Broadcasting's petition for leave to amend to reflect, among other things, the substitution of Thomas Arterburn for William Atkins as a principal of the applicant corporation. See paragraphs 9–11, *supra*. However, both Arterburn and Atkins will be treated as "principals" of Athens Broadcasting for the purpose of resolving the serious public interest questions being added. *Cf. Rhinelander Television Cable Corp.*, 37 FCC 1071, 3 RR 2d 1014 (1964).

closures and misstatements made by the applicant.[35] *Cf. Glenn West*, 23 FCC 2d 235, 19 RR 2d 29 (1970). All of the issues being added will inquire into the basic and/or comparative qualifications of Athens Broadcasting to be a Commission licensee.[36]

3 J's' PAST BROADCAST RECORD

23. Finally, we come to the matter of 3 J's' past broadcast record. The second hearing in this proceeding was ordered by the Commission for the express purpose of inquiring into that record under the standard comparative issue. See paragraph 3, *supra*. The Hearing Examiner, in his Cumulative Initial Decision, released July 29, 1970, concluded, in effect, that 3 J's' record was "unusually poor". In the Examiner's opinion, 3 J's deviated substantially "from the norm of sound licenseeship". In reaching his ultimate conclusion, the Examiner found several flaws in 3 J's' record, including the filing of a false jurat with the Commission (which is a federal crime), dissemination of a misleading survey, sloppy log keeping in violation of Commission Rules, and broadcasting a lottery. See paragraph 3, *supra*. Exceptions to the Cumulative Initial Decision are now pending before us. We need not decide at this time whether 3 J's' record is "unusually poor" within the meaning of the term as used in the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 398, 5 RR 2d 1901, 1911–13 (1965). See also *East St. Louis Broadcasting, Inc.*, 9 FCC 2d 212, 10 RR 2d 859 (1967). Suffice it to say that the evidence already adduced in this proceeding raises serious questions as to whether 3 J's should be entrusted with a second broadcast facility in Athens, Tennessee. In this regard, it is well settle that, "before a grant [of a broadcast license] may be found to be in the public interest, the Commission is entitled to have some reasonable assurance that the applicant will diligently exercise that degree of licensee responsibility expected of the operator of a broadcast facility, *and past conduct of an applicant in the operation of a station must be accorded substantial weight.*" *DuPage County Broadcasting, Inc., supra*, 21 FCC 2d at 398, 18 RR 2d at 325. (Emphasis added.) *Cf. Harvit Broadcasting Corporation*, 31 FCC 2d 876, 22 RR 2d 1062 (1971). Several of the incidents and violations (*e.g.*, the false jurat) are admitted by 3 J's, although it pleads that its record is not "unusually poor" because of mitigating circumstances. In our opinion, the serious questions raised by the record at the second hearing necessitate an examination into whether 3 J's is basically qualified to be a Commission licensee. Therefore, we will specify an appropriate disqualification issue on our own motion. *Cf. Charles County Broadcasting Co., Inc.*, 25 RR 903, 906 (1963).

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[35] There is insufficient basis in the record, however, to inquire into the narrow question of Atkins' candor at the third hearing.

[36] "Whether misconduct such as that [apparently] committed [by Athens Broadcasting] is of sufficient gravity to warrant the revocation or denial of renewal of a station license is not the critical issue here. We are not now concerned with the renewal or revocation of [WLAR's] station license, but with the question of whether [Athens Broadcasting] * * * should be entrusted with a second broadcast facility." *DuPage County Broadcasting, Inc., supra*, 21 FCC 2d at 397–98, 18 RR 2d at 324–25.

The past broadcast record of 3 J's is not to be retried, however; the existing record is sufficient, in our view, upon which to base conclusions on the issue being added. However, if any of the parties wish to tender new evidence relating to 3 J's' past broadcast record, they may do so at the remand hearing. The parties will, of course, be free to argue as they wish on whether 3 J's should be disqualified.[37]

24. Accordingly, IT IS ORDERED, That the Petition for Leave to Amend Application, filed April 4, 1972, by Athens Broadcasting Company, Inc., as supplemented, IS DENIED; and

25. IT IS FURTHER ORDERED, That the Motion to Make More Definite and Certain, and the Motion for Extension of Time, both filed April 10, 1972, by John P. Frew and Julia N. Frew, d/b as 3 J's Broadcasting Company, ARE DISMISSED as moot; and

26. IT IS FURTHER ORDERED, That the Petition to Enlarge Issues, filed August 3, 1972, by John P. Frew and Julia N. Frew, d/b as 3 J's Broadcasting Company, IS GRANTED; and

27. IT IS FURTHER ORDERED, That the record herein IS REOPENED and the proceeding IS REMANDED for the purpose of hearing evidence on the following issues:

(a) To determine whether Athens Broadcasting Company, Inc. complied with the provisions of Sections 1.65 and 1.615 of the Commission's Rules, and, if not, the facts and circumstances surrounding such failure to comply.

(b) To determine whether there have been any false statements, misrepresentations, lack of candor, or nondisclosure of material facts in this proceeding by Athens Broadcasting Company, Inc. and/or its officers, directors or stockholders, and, if so, the facts and circumstances thereof.

(c) To determine whether Athens Broadcasting Company, Inc. and/or its officers, directors, and stockholders have been negligent, careless or inept either in the operation of standard broadcast Station WLAR, Athens, Tennessee, or in this proceeding, and, if so, the facts and circumstances thereof.

(d) To determine, in the light of the evidence adduced pursuant to the foregoing issues, the effect on Athens Broadcasting Company, Inc.'s basic and/or comparative qualifications to be a Commission licensee.

(e) To determine whether, in light of the evidence adduced at the second hearing in this proceeding concerning the past broadcast record of John P. Frew and Julia N. Frew, d/b as 3 J's Broadcasting Company, the applicant may reasonably be expected to exercise diligently that degree of licensee responsibility required by the operator of a broadcast facility and whether the public interest would be served by permitting the applicant to acquire an additional broadcast authorization.

28. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence on Issues (a)–(d) SHALL BE upon John P. Frew and Julia N. Frew, d/b as 3 J's Broadcasting Company; and that the burden of proof under Issues (a)–(d) SHALL BE upon Athens Broadcasting Company, Inc.; and

[37] If the Examiner ultimately determines that neither Athens Broadcasting nor 3 J's should be entrusted with a second broadcast facility, then a comparative evaluation of the applicants would, of course, be unnecessary. For, although there are but two applicants for the only FM station in Athens, a license does not *have* to be issued to either. "[T]he appropriate consideration is what the public interest dictates. If that interest commands a withholding of the license from [both] applicants . . . then the Commission *must* disallow the permit until qualified application is made . . . [T]he prospect of a 'dark' channel is not nearly as disturbing as a channel allocation to an unqualified licensee. . ." *WEBB, Inc.* v. *FCC*, 136 U.S. App. D.C. 316, 320 n. 2, 420 F. 2d 158, 162 n. 2, 16 RR 2d 2191, 2195 n. 2 (1969). (Emphasis added.)

29. IT IS FURTHER ORDERED, That the burdens of proceeding and proof under Issue (e) SHALL BE upon John P. Frew and Julia N. Frew, d/b as 3 J's Broadcasting Company; and

30. IT IS FURTHER ORDERED, That the Administrative Law Judge SHALL ISSUE a "Further Supplemental Initial Decision" pertaining to all aspects raised under these additional issues.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72D-848

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

AUTHORIZATIONS IN THE AVIATION SERVICE GRANTED TO CATALINA SEAPLANES, INC., FOR AERONAUTICAL ENROUTE STATIONS KYO3 AT SAN PEDRO AND KYN5 AT AVALON, CALIF.

APPLICATION FOR RELOCATION OF ENROUTE STATION KYN5 AT AVALON, CALIF., FILED BY CATALINA SEAPLANES, INC.; FILE 13-A-ML-52; AND

MOTION FOR STAY AND PETITION FOR REVIEW FILED BY AERONAUTICAL RADIO, INC., IN RE AERONAUTICAL ENROUTE STATION KQS7; FILE 73-A-L-42

MEMORANDUM OPINION AND ORDER

(Adopted September 27, 1972; Released September 29, 1972)

BY THE COMMISSION:

1. The Commission has before it for consideration the above captioned matters. The request filed March 9, 1972 by Aeronautical Radio, Inc. (ARINC), entitled "Petition for Reconsideration of Action by the Commission En Banc" requests us to reconsider our action set forth in our Memorandum Opinion and Order released February 9, 1972 (FCC 72-95). By that action we considered a Petition for Reconsideration of action taken by the staff which was filed by ARINC and addressed to the Chief of the Safety and Special Radio Services Bureau. In response thereto we affirmed the staff grants under delegated authority on August 18, 1971, of enroute station authorizations in the Aviation Service for stations KYO3 at San Pedro and KYN5 at Avalon, California to Catalina Seaplanes, Inc. (Seaplanes); denied requests by ARINC and Golden West Airlines, Inc. (Golden West) that the grants be set aside; and dismissed applications by ARINC for enroute station authorizations at the same locations. ARINC again requests us to set aside the Seaplane grants and designate their applications, together with ARINC's applications, for comparative hearing.

2. The action previously taken by us in the Memorandum Opinion and Order on February 9, 1972, constituted, in effect, a review within the meaning of Section 1.115 of the rules of an action taken pursuant to delegated authority. Although ARINC has already received consideration by the Commission en banc of the staff action against which it complains, we will further review the matter on its merits to insure that ARINC receives every consideration by us to which it may be entitled.

3. To aid in a better chronological understanding, we list below the significant developments in the matter as indicated in our records:

April 6, 1970	Applications by Catalina Seaplanes, Inc. (files 39–A–L–40 and 40–A–L–40) received for ground stations in the aviation services (Airdrome Control) as San Pedro and Avalon, Calif. (125.7 MHz).
April 12, 1970	Applications placed on public notice.
April 13 to June 22, 1970.	Applications returned to applicant and resubmitted to Commission several times because of need for specifying different frequency, FAA clearance, or other rule requirements to establish eligibility.
April 12, 1971	Applications resubmitted as control stations, but requesting an enroute station frequency (129.0 MHz). Applications assigned new file numbers 46–A–L–41 and 47–A–L–41).
April 16, 1971	Applications returned because of nonavailability of requested frequency for use by control station.
April 22, 1971	April 12 applications placed on public notice.
May 7, 1971	Applications resubmitted, amended for enroute stations on newly executed FCC Form 406.
June 17, 1971	Applications again placed on public notice as received in period June 7 through June 11, 1971.
June 24, 1971	Staff wrote applicant concerning eligibility for enroute station and requesting additional information as to why existing enroute station service (from ARINC station at Long Beach, Calif.) was not adequate (copy of letter furnished ARINC).
July 28, 1971	Applicant replied to June 24 letter stating there was a conflict in its operational hours and those of the existing enroute station, and applicant included a description of early morning foggy weather conditions on Catalina Island.
August 10, 1971	Applications returned with instructions to remit additional filing fee.
August 16, 1971	Applications resubmitted with additional fee.
August 18, 1971	Applications granted.
September 7, 1971	Applicant furnished 1970 filed FCC applications forms 406 with fee paid stamp thereon, and also copy of canceled fee check in amount of $20.
September 9, 1971	Commission wrote applicant advising that collection of additional filing fee was an administrative error and would be refunded.
September 9, 1971	Petition for reconsideration of grants to Seaplanes and competing applications filed by ARINC.
February 9, 1972	Memorandum, opinion, and order released denying ARINC petition, dismissing its applications, and affirming staff grants to Seaplanes.
March 9, 1972	Petition for reconsideration of action by the Commission en banc filed by ARINC.
April 13, 1972	ARINC files application for en route station at Pebble Beach on Catalina Island, Calif.
April 14, 1972	Seaplanes requests special temporary authority (STA) to move its Avalon station about a mile to Pebble Beach Calif. where city has relocated all seaplane operations to a new terminal, and STA granted for 60 days (since renewed to Oct. 12, 1972).
May 2, 1972	Seaplanes files formal application for relocation of station to Pebble Beach.
May 22, 1972	ARINC application of April 13 granted.
June 9, 1972	ARINC files petition to deny Seaplanes May 2 application.
June 16, 1972	Staff wrote ARINC setting aside grant of May 22 and dismissing application as defective.
June 21, 1972	ARINC files motion to stay and petition for review of staff action in setting aside grant of May 22.

4. ARINC asserts, generally, but in more detail than previously (a) that we did not deal in our Memorandum Opinion and Order of February 9, "with the development of the aeronautical enroute service . . ." and ". . . the serious public interest questions involved in this case . . ." and (b) that the grant of the subject station authorizations to Seaplanes was ". . . not permitted under the Communications Act, under the Commission's Rules, nor under elementary standards of fairness and due process" in that the grants were made before 30 days public notice after acceptance of the Catalina Seaplane applications for filing.

5. Specifically, ARINC asserts as follows:

a. The Seaplanes applications are subject to the $20 filing fees adopted in Docket No. 18802 effective August 1, 1970, and not the former $10 fee, and that "* * * confusion on this point is manifest in paragraph 2 of its Memorandum Opinion and Order * * *" infra.

b. The Commission in its order of February 9 does not mention the staff ruling on August 10, 1971, that Seaplanes applications be returned for failure to remit a $20 filing fee per application or a staff telephone conversation with Seaplanes on September 3, 1971 informing Seaplanes that the original 1970 airdrome control applications should be returned for credit against the required filing fee of $20 per application.

c. The Commission erred by treating the April, 1971 applications, specifying a new class of service, as resubmitted April 1970 applications, rather than new applications since Seaplanes had evidenced no intention of prosecuting the 1970 applications during the intervening 10 month period, and Section 1.956 of the rules provides that applications not resubmitted within 30 days will be treated as new applications, especially when the resubmitted application, if on a reexecuted form, is not accompanied by the previously filed application form stamped to show the fee paid. ARINC quotes several passages from our orders in the fee schedule docket and cites *23 FCC 2d 886* and *28 FCC 2d 139, 141 and 142* concerning the filing fee applicable for applications received after August 1, 1970.

d. The required filing fees for Seaplanes applications were not remitted prior to the grant of its station authorizations, since the grants were made on August 18, 1971, and the original applications with a fee paid stamp, which is "the only permissible evidence of fees paid * * *" and the only evidence that the applicant is relying upon credit for those fees, was not returned by Seaplanes to the Commission until September 7, 1971 (more than two weeks after the grants) which is the earliest date the applications could be accepted for filing.

e. If the Commission is going to allow defective application forms to be resubmitted for credit with applications for completely different facilities (different frequency and class of service) it must require that they be submitted together since, otherwise, Seaplanes would be free to use these defective forms for credit on other Aviation Service applications.

f. The Seaplanes station authorization grants violated the public notice provisions of Section 309(b) of the Communications Act and Sections 1.962 and 1.1102(a) of the Commission's Rules in that the public notices on April 22 and June 17, 1971 of the 1971 applications was before the application could, under the Commission's Rules, be accepted for filing, and that this procedure constitutes non-compliance by the Commission with its own published regulations which is not countenanced by the courts, and invalidates the Commission action. In support of this argument, ARINC cites several judicial decisions which it submits are material, and it quotes from Appendix B "Interpretation of Fee Rules and Procedure" to Part 1 of our rules which states, in part, that an application will not take its place on the processing line until the full amount of the prescribed fee has been paid.

g. The Commission's procedural handling of the 1971 applications of Seaplanes was unfair to ARINC in that (a) "had ARINC inquired as to the applications when public notice was first given on April 22, 1971, it would have been informed that the applications were returned and could not be made available to ARINC,"

(2) "Had ARINC inquired on June 24, 1971, a scant week after the notice of the revised applications, it would have been informed that the staff was inquiring into Seaplanes' qualifications * * *", (3) the applications were available for inspection by ARINC only between August 2 and 9th, and between August 16 and 17, and (4) ARINC responded to the April 22 public notice "in as constructive a manner as practicable * * *" when it initiated efforts to provide service to Seaplanes.

6. On March 23, 1972, an "answer" to the ARINC Petition for Reconsideration En Banc was filed by Golden West Airlines, Inc., (Golden West) and essentially incorporated ARINC's argument by reference and asserted that the Seaplanes grants were unsound as a matter of policy because Golden West is forced to have its communications needs provided by its competitor on the same working frequency. On April 6, 1972, Seaplanes replied to the Golden West filing and disagreed with the Golden West position.

Seaplanes Relocation Applications

7. On May 2, 1972, Seaplanes filed an application to relocate the Avalon station about a mile from its authorized location to Pebble Beach. Seaplanes asserted that the relocation was necessary to comply with requirements of the City of Avalon that all seaplane operations for the city be conducted from a new amphibian terminal and not from the main harbor area which had been used by both seaplanes and surface vessels at a hazard. On June 9, 1972, ARINC petitioned to deny the Seaplanes application arguing essentially, that the Seaplanes application is not a request to relocate an existing station, but rather, an application for a new station and subject to a *de novo* finding that the grant would serve the public interest. ARINC further argues that the proposed modification of Seaplanes license would constitute unauthorized duplication of service since ARINC already operates an enroute station at Pebble Beach.

8. The ARINC station referred to by ARINC at Pebble Beach was authorized on May 22, 1972. The grant was subsequently set aside on June 15, 1972 by the staff pursuant to authority contained in Section 1.113(b) of our rules because the application was not in accordance with our rules and should have been dismissed as defective. Section 87.291(b) provides that only one enroute station will be authorized to serve a local area and at the time of the filing and grant of the ARINC application, there was an outstanding authorization for an enroute station KYN5 at Avalon, California, issued to Seaplanes; which is one of the two Seaplanes stations involved in this proceeding. ARINC has requested us to stay and review the staff's action in setting aside the grant of the authorization on May 22, 1972. In seeking this review, ARINC alluded to the pending matter of its Petition for Reconsideration on the Seaplanes authorizations and essentially, argues that Pebble Beach is a different location and area from Avalon and that ARINC's application for a station there is entitled, at least, to a comparative hearing with the application of Seaplanes which is not an application for relocation, but, rather, an application for a new station to serve a new area. ARINC refers to its other filings in this matter and cites *Artic Tel. & Tel. Co., and*

Aeronautical Radio, Inc. 8 RR 1095 (1953) in support of its position. In that case we denied a request by ARINC that its application to relocate its enroute station at Elmendorf Field, Anchorage, Alaska be granted without a hearing with a competing application. Although the matter of ARINC's Petition for Review is separable from its Petitions for Reconsideration and to Deny, we will consider all three matters herein because they are interrelated, and ARINC makes reference in the Petition for Review to the other two petitions.

ARINC Petition for Reconsideration

9. The ARINC Petition for Reconsideration *en banc* presents no new substantial and material information that was not previously considered by us at the time we acted on ARINC's first petition for reconsideration. With respect to ARINC's assertion that we did not deal with the development of the enroute service and the serious public interest questions involved in this case, we disagree. As stated in our Memorandum Opinion and Order of February 9, we expressly stated that neither the General Order of the Federal Radio Commission that established the enroute station service, nor our rules provide that there shall be only one licensee for this class of radio station and therefore the applications and grants of Seaplanes were in accordance with law and our rules. Additionally, by our action of affirming the station authorization grants to Seaplanes and denying ARINC's request that the grants be set aside, we said, in substance and in effect, that the grants served the public interest by establishing an enroute station at a location, on Catalina Island, where there was no station of that class to provide service, and because there was no other application on file at the time for an enroute station at that location.

10. With respect to ARINC's specific complaints of irregularities in the filing, fee collection, amendment to, and public notice and granting of the Seaplanes applications, the short answers to these points are that we do not agree that there were any irregularities in processing these applications. Even if there were, however, ARINC has not satisfactorily shown that it in any way relied on any processing irregularity, real or apparent, to its detriment, or that it failed because of any irregularity to object to the applications when it could have done so under the law and our rules. In its first petition for reconsideration treated by us in our February 9 order, ARINC stated that it failed to file timely objections to the Seaplanes applications because it had made an offer of service to Seaplanes to which it had received no response. It did not claim that the failure was due to irregularities in licensing processing. ARINC was certainly aware of its option and it apparently elected to forego its right to file a petition to deny and relied on resolving the matter by direct negotiations with the applicant.

11. ARINC's confusion with respect to the propriety of accepting in 1971 the amended and returned 1970 applications of Seaplanes and not treating them as new applications for purposes of determining that new filing fees were required, may stem from a misunderstanding by ARINC of our rule provisions. ARINC cites Section 1.956 of the

rules which provides that applications not resubmitted within 30 days after being returned to an applicant, will be treated as a new application. ARINC, however, quotes that rule provision out of context. Section 1.956 is located under a general rule heading entitled "Application Processing Procedures" and follows Section 1.953(a) that reads, in part, "Applications are processed in sequence according to the date of filing". Section 1.956, located thereafter in the rules, advises the public that when an application has been returned to an applicant for correction, if the applicant wants to retain processing priority of the application according to the date it was filed, the application must be returned to the Commission within 30 days of the date on which it was returned to the applicant. The rule provides that, otherwise, the application will be treated as a new application and *considered at the time other applications received on the same date are considered* (emphasis supplied). It is important to note that this provision takes into consideration the interests of other applicants who may have filed intervening applications and are entitled to a limitation of the time in which a returned application should be processed before processing of their application. Section 1.956 does not apply to filing fees which are covered in Section 1.1115 of our rules. Thus the wording "treated as a new application", in context with the remainder of the rule section, means that the application returned after 30 days will be treated as a new application for purposes of determining the order of processing and not for purposes of determining whether a new filing fee must accompany the application.

12. The question of whether or under what circumstances a new filing fee should be required when an application has been returned to the Commission after correction, or amendment, was carefully considered by us in our several actions on filing fees cited by ARINC in its petition: We specifically considered whether to include a time limitation within which an application must be returned in order to extend credit for a paid filing fee. Such a provision was rejected and we adopted, in Section 1.1115, rules that are "open ended" and contain no time limitations within which an application must be resubmitted for filing fee credit. It was our deliberate intention to adopt a policy and practice that would be administratively simple and yet fair to the public by not requiring the payment of new filing fees for resubmitted applications in as many instances as practicable. In furtherance of this policy, Section 1.1102(i) of the rules was promulgated. That section provides that applications returned to applicants for correction will not require additional filing fees and, unlike Section 1.956, contains no limitation on the time allowed to return the application without paying an additional fee, nor does it contain a requirement that the applicant must have notified the Commission of an intent to prosecute the applications as alluded to by ARINC.

13. Accordingly, when the Seaplanes applications were resubmitted in 1971 on a re-executed FCC Form 406 [1] different from the Form 406 filed in 1970, but accompanied by the Form 406 filed in 1970 with a fee paid stamp thereon, they were accepted, in conformity with the rules

[1] Application for Ground Station Authorization in the Aviation Services.

and the above-described policy, without a new filing fee although they were resubmitted several months after being returned to the applicant for corrections or amendments. Moreover, they were not rejected because of an inadequate filing fee ($20 specified after August 1, 1970 as compared with $10 prior to that date) because they were filed prior to August 1, 1970, and were not subject to the new filing fees charged subsequent to that date, as expressly provided for in our Report and Order in Docket No. 18802 and reiterated in paragraph 4 of our Memorandum Opinion and Order in that Docket released April 1, 1971.

14. The applications, a few days later, were once again returned to the applicant for corrections or amendments and were again resubmitted on May 7, 1971, but without the accompanying earlier executed Form 406 with the fee paid stamp thereon. The applications were again accepted for processing because the history cards contained entries indicating that the filing fees had been paid; i.e., an entry showing that an application has been received is considered prima facie evidence of the payment of a filing fee since the Commission's rules provide that an application will not be accepted unless accompanied by the proper filing fee. While there is little question that an application form with a fee paid stamp thereon is almost conclusive evidence of the payment of a fee, it does not necessarily follow that it is the only evidence of the payment of a fee. Our instructions to applicants state that in lieu of the stamped form, they may instead furnish copies of paid checks. Payment of fees could also be established by other forms of evidence ordinarily acceptable in the business and commercial community such as records made in the ordinary course of business which as akin to our licensing records and history cards. In any event, whatever doubt may have existed as to the payment of the required filing fees by Seaplanes at the time of the initial filing of applications for authorizations in the Aviation Services, it has since been satisfactorily resolved in favor of Seaplanes by the return to the Commission files of the originally filed applications with the fee paid stamp on the face of the Forms 406.

15. ARINC has expressed concern that by again accepting on May 7, 1971, the resubmitted applications of Seaplanes without the application forms being accompanied by the earlier forms with the fee paid stamp, the Commission may be freeing Seaplanes to use those defective forms for credit on other Aviation Service applications. The Commission has internal procedures which will allow for cross-checking to insure, for all practical purposes, that double credit will not be given for a fee.

16. ARINC's confusion as to whether the resubmitted applications of Seaplanes were applications in different services, and therefore subject to treatment as new applications within the meaning of question G4–11 in Appendix B [2] to Part I of our rules may result from a misunderstanding of the terms applying to classes of stations and

[2] Appendix B containing interpretations to our fee schedule rules is not included in the current transmittal sheets of our rules since it is in the process of revision. The interpretations contained in the previous edition of the rules are applicable to Seaplanes applications, however, since the edition was in effect at the time the Seaplanes applications were initially filed in 1970.

radio services. An aeronautical enroute is not a station in a service different from an airdrome control station. Both are in the aeronautical mobile service. In the interpretations to question G4–11 we explained that an application will be considered a new application, requiring a new filing fee, when the application is amended to show a different service; e.g., from the Special Industrial Radio Service to the Business Radio Service, or from the Rural Radio Service to the Domestic Public Land Mobile Radio Service. Each of these services are shown as separate and distinct services in our rules and in some cases are even contained in different parts of our rules and may require different FCC filing forms. For the Aviation Services, however, interpretation (c) for question G4–11 expressly states that an application will be considered "a new application if it changes the application to a different class of station requiring a different application form." In the case of Seaplanes applications the prescribed application form for each class of station applied for during 1970 and 1971 did not change the FCC Form 406, thus there was no need for these reasons to consider that the applications were amended to show different services on a different form which would have required treatment as a new application requiring a new filing fee. Since Seaplanes was entitled to receive credit on its applications filed in 1971, on FCC Form 406 for authorizations in the Aviation Services, for the filing fees paid in 1970 (for applications in the same service on the same prescribed FCC forms) the acceptance of the 1971 applications without new or additional filing fees was in accordance with the rules and the interpretations contained in the rules. Any public notice thereafter would not be a notice prior to acceptance of the applications by the Commission and in violation of the public notice requirements of Section 309(c) of the Communications Act as asserted by ARINC. The return of the originally filed 1970 applications to the Commission on September 7, 1971 for inclusion in the licensing files did not constitute payment of the filing fee on that date as maintained by ARINC. The return of the forms with stamps indicating fees paid, merely constituted corroborative evidence that the fee was paid in 1970, as already reflected in the Commission's license processing files.

17. ARINC states that we did not mention in our Memorandum Opinion and Order of February 9, the staff action on August 10, 1971 at which time Seaplanes applications were returned for failure to remit the proper filing fee, and the staff telephone call to Seaplanes on September 3, 1971. We do not believe that either of these events has any significant probative value in helping us to resolve this matter and in acting equitably and fairly on the ARINC petitions. To clear up any confusion that ARINC may have, however, the following explanation is furnished. The purpose of the referred to telephone call to Seaplanes on September 3, 1971 was to advise Seaplanes that ARINC had alleged the station authorization grants to Seaplanes to be invalid because they were unaccompanied by a filing fee; that as far as the staff was concerned, the complaint was without merit because the licensing records indicated, prima facie by entries on the application history cards, that the proper filing fees had been paid at the time of the earlier filed Aviation Service application; but since the fact was

being challenged it may be in the best interests of all concerned to resolve any doubt on the matter and to return the originally filed Forms 406 if they were available. Seaplanes did so four days later as the record reflects.

18. The staff action on August 10, 1971, in returning the applications for proper filing fees was an administrative error by a clerical application processor. The applications should not have been returned because the application records even without the 1970 Seaplanes application with the fee paid stamped thereon, indicated the filing fee had been paid. When the erroneous return was discovered at the time of the resubmission of the applications with the additional filing fees, Seaplanes was notified of the error, and of action to refund the additional filing fees, by letter on September 9, 1971. Since the administrative error made in the processing line of the Aviation and Marine Division had been detected and corrected, that aspect of the matter was closed as explained to Seaplanes in the abovementioned letter. ARINC was fully informed on the development since we furnished it a copy of that letter. We do not know what further discussion of this incident in our February 9 order would have contributed to our consideration of ARINC's complaints.

19. Finally, we consider ARINC's complaint as to what might have happened had ARINC visited the Commission offices to inspect the enroute station applications of Seaplanes, and that the applications would not have been available for examination to be unpersuasive. The point is, ARINC does not allege that it did visit the Commission's application processing offices or that it ever expressly requested permission to examine the Seaplanes applications. Conjecturing by ARINC as to what might have happened had it done so, does not aid us in objectively and fairly acting on their complaints. The facts are, contrary to ARINC's express or implied assertions that the applications were not available for their inspection, the applications were physically present in our application processing offices and available to the public for over three months from the date of the re-filing of the amended applications for enroute stations on May 7, 1971, until the date of the grant of station authorizations on August 18, 1971; except for a brief period of 6 days (2 of which were non-work days) from August 10 to 16, 1971, when they were erroneously returned to the applicant as hereinabove described. The applications were available for ARINC inspection for a period of almost two months after the public notice of June 17, 1971, which is more than adequate for them to visit the Commission's offices and inspect the Seaplanes applications, except for four work days in August. ARINC has not asserted that it visited the Commission's offices during those four days, however, and thus was prejudiced or substantively harmed by the absence of the applications from our files at that time.

20. In view of the foregoing, we find that ARINC has not established that the grants on August 18, 1971 of station authorizations to Catalina Seaplanes, Inc., for the operation of aeronautical enroute radio stations at Avalon and San Pedro, California were contrary to law, our rules, or the public interest.

109-011—72——4

Service to Golden West

21. With respect to the comments made by Golden West concerning the inadequacy of service provided to Golden West by Seaplanes on the assigned frequency 129.0 MHz, it appears that a solution to any problem there, may be provided by the assignment upon proper application, of an additional enroute station frequency. There is no provision in our rules that limits to one, the frequencies that may be assigned on one license to an enroute station and our records show that there are numerous instances where we have assigned more than one frequency to an enroute station. An application for the assignment of an additional frequency could be, under our rules, designated for hearing, however, if it were opposed for good cause by the filing of a petition to deny the application.

ARINC's Petition To Deny

22. With respect to ARINC's Petition to Deny the Seaplanes application for relocation of its Avalon station from the main Avalon boat/seaplanes harbor to the nearby Seaplanes terminal at Pebble Beach we find the petition to be without merit. The 1953 Arctic/ARINC case cited by ARINC is distinguishable, since the circumstances differ substantively and materially from those in the matter here under consideration. In that case the area to be served was not a single area, but one of several landing areas in the vicinity of Anchorage, Alaska, all distinctly and geographically separated from Anchorage and each other. ARINC then, applied for a station to serve the International Airport and be located about ten miles from Elmendorf Field on the opposite side of Anchorage, near, but not on, the International Airport, with remote control points on the International Airport and at a third landing area near Anchorage, Merrill Field. ARINC represented that it was seeking "relocation" of its station at Elmendorf Field, which had discontinued operating. We held that application to be an application for a new station to serve a different locality and landing area and subject to comparative hearing, and not preferential status, with an application on file by Arctic for a like class of station to be located at, and to serve, the international Airport. In the subject matter there are not two or more distinct airports or aeronautical local areas serving the town of Avalon on Catalina Island. There appears to be only a single point on the water front, precisely situated as determined by municipal authorities, where seaplanes may land and conduct transport activities, to serve the town. As stated by Seaplanes, and not refuted by ARINC, all seaplanes operations "*for the city*" (emphasis supplied) were to be separated from the surface boat operational area and relocated in a new seaplanes terminal by direction of the city of Avalon. The local Avalon area to be served by the Seaplanes Terminal and the station remained unchanged. Under these circumstances we find the application of Seaplanes to be an application to relocate an existing station and not an application to serve a new or different airport or landing area within

the meaning of Section 87.291(b) of our rules and thereby subject to the filing of a competing application. The Petition to Deny filed by ARINC, therefore, must be denied.

REQUESTS FOR REVIEW AND TO STAY

23. Concerning the action of the staff in setting aside its grant of an authorization on May 22, 1972, to ARINC for an enroute station at Avalon, it is clear to us that the action was necessary since it was obviously in conflict with Section 87.291(b) of the rules, providing that only one enroute station could be authorized to serve a local area and there was already a station authorized to Seaplanes and in operation serving the area. The staff had no other appropriate and proper alternative but to rectify the administrative error made by granting the ARINC authorization and it did so when it set aside the grant within the 30 days permitted by Section 1.113(b) of the rules. Therefore, the action requested by ARINC in its Petition for Review must also be denied. In view of this, no action is necessary on ARINC's request to stay staff action.

24. Accordingly, IT IS ORDERED, That the Petition for Reconsideration of Action by the Commission En Banc, filed March 9, 1972, by ARINC, IS DENIED with respect to the action requested therein, and the staff action of authorizing operation of enroute stations KYN5 and KYO3 at Avalon and San Pedro, California, respectively IS REAFFIRMED.

25. IT IS FURTHER ORDERED, That the Petition to Deny the Seaplanes application to relocate its Avalon station to Pebble Beach, Avalon, California, filed by ARINC on June 9, 1972, IS DENIED and the Seaplanes application IS GRANTED.

26. IT IS FURTHER ORDERED, That the Petition for Review filed by ARINC IS DENIED with respect to the request contained therein that we reverse the order of the Chief of the Safety and Special Radio Services Bureau rescinding the grant of the ARINC authorization for a station at Pebble Beach and set the ARINC application for that station for comparative hearing with the application of Seaplanes.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72D–54

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of: DR. JOHN N. DENNING AND WILLIAM R. BRITT, D.B.A. CLAYTON BROADCASTING CO., CLAYTON, N.C. For a Construction Permit	Docket No. 19365 File No. BP–18472

APPEARANCES

A. L. Stein on behalf of Clayton Broadcasting Co.; *Theodore Baron* (Wilkinson, Cragun & Barker) on behalf of Curtis & Associates, Inc.; *Richard Hildreth* and *Vincent Curtis* (Fletcher, Heald, Rowell, Kenehan & Hildreth) on behalf of The Farmville Broadcasting Company; *John B. Jacob* (Cordon and Jacob) on behalf of Radio Washington, Inc.; *Katherine S. McGovern* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER CHESTER F. NAUMOWICZ, JR.

(Issued August 7, 1972; effective date September 28, 1972 pursuant to section 1.276 of the Commission's Rules)

PRELIMINARY STATEMENT

1. By order released December 14, 1971, the above-captioned application was consolidated for hearing with the mutually exclusive applications of Curtis & Associates, Inc., The Farmville Broadcasting Company, and Radio Washington, Inc. By order of the Examiner adopted July 24, 1972, all of the other applications were dismissed. On August 4, 1972, Clayton Broadcasting Company filed an affidavit of no consideration pursuant to Rule 1.525.

FINDINGS OF FACT

2. The dismissal of the competing applications has rendered moot all of the issues specified in the order of designation.

CONCLUSIONS

3. The designated issues having been mooted, and the applicant having been found otherwise qualified in the order of designation, the public interest would be served by a grant of the subject application.

Accordingly, IT IS ORDERED, That unless an appeal is taken to the Commission by a party or the Commission reviews the Initial Decision on its own motion pursuant to Rule 1.276, the application of Dr. John N. Denning and William R. Britt, d.b.a. Clayton Broadcasting Company IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
CHESTER F. NAUMOWICZ, *Hearing Examiner.*

F.C.C. 72-695

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of
CORPORATION FOR COMMUNITY RADIO, RICHMOND, CALIF.
Requests: 90.1 MHz, No. 211; 10 W.
For Construction Permit

MEMORANDUM OPINION AND ORDER

(Adopted July 26, 1972; Released August 1, 1972)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT. COMMISSIONER WILEY DISSENTING. COMMISSIONER HOOKS NOT PARTICIPATING.

1. The Commission has before it for consideration the above-captioned and described application for a construction permit for a new noncommercial educational FM broadcast station and a request for waiver of section 1.573 of the Commission's rules for acceptance of the application.

2. Based upon the method specified in the Commission's rules, interference is predicted within the proposed station's 1 mv/m contour from the licensed operations of stations KANG, Angwin, and KCMA, San Francisco, California. (Interference is also predicted within the 1 mv/m contour from a proposal contained in the application of co-channel station KZSU, Stanford, California, submitted to the Commission on June 2, 1972, for an increase in the KZSU facilities). Section 1.573 of the Commission's rules does not permit acceptance or grant of an application which either causes or receives interference within 1 mv/m contours.

3. In support of the request for waiver it is shown that there are terrain obstructions in the line-of-sight from KANG to the proposed Richmond station. As a result of receiving tests, it is stated that a listenable signal could not be received from KANG in Richmond. It is further stated that the terrain from 10 to 20 miles from KANG departs radically from that at 2 to 10 miles and the propagation curves are not valid for predicting the signal strength of KANG. It is believed that if the station were to be built it should experience no interference from KANG. It is further stated that the interference to be received from KCMA is mostly in San Francisco Bay and is not detrimental. (As the present operation of KZSU and the proposed Richmond operation are not involved in interference within 1 mv/m contours and as the KZSU proposal was submitted after the Richmond proposal, this Memorandum Opinion and Order will concern itself with the interference from KANG and KCMA.)

4. Section 73.313(e) of the Commission's rules states that where the terrain departs widely from the average elevation of the 2-to-10-mile sector, the prediction method may indicate contour distances that are different from what may be expected in practice, and in such cases, the prediction method should be followed, but a supplemental showing may be made concerning the contour distances as determined by other means. The showing that obstructions exist on radials from KANG to the proposed operation, that a listenable signal could not be received from KANG when listening tests were made, and that the propagation curves are not valid for predicting the signal strength of KANG because of the terrain in the area, cannot be accepted as a sufficient showing to prove that no interference will result. Listening tests are never acceptable as a tool in the making of channel assignments.

5. Any interference from KANG and KCMA will be destructive interference to the proposed operation. A small portion of the interference area lies in San Francisco Bay and this is not considered objectionable. A 10-watt station can only serve a very small area within its 1 mv/m contour and it does not appear that this already small area should be restricted by interference from other stations. Although no other channels appear to be available which would permit an interference-free 1 mv/m service area, this is not considered a reason to justify a sub-standard assignment. No convincing showing is made as to the uniqueness of the proposed programming or that it is not already being provided by the numerous commercial AM, FM, and noncommercial educational FM stations providing service in the area.

6. It does not appear that any of the reasons advanced by the applicant are sufficiently compelling to warrant a waiver of section 1.573 of the rules and acceptance of the application. Waiver could only be justified on the basis of a compelling showing. This the applicant has failed to provide. Since it has failed to provide a showing, sufficient if true, to warrant waiver, a hearing on the request is not required.[1]

7. Accordingly, IT IS ORDERED, That the request of Corporation for Community Radio for waiver of section 1.573 of the Commission's rules IS DENIED, and that the above-captioned application IS RETURNED to the applicant.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[1] *U.S.* v. *Storer Broadcasting Co.*, 351 U.S. 192, 13 RR 2161 (1956).

F.C.C. 72R-267

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application FRANK M. COWLES, GREEN BAY, WIS. For Construction Permit	Docket No. 18790 File No. BP-17595

APPEARANCES

Theodore Baron, on behalf of Frank M. Cowles; *Adrian L. Roberts*, on behalf of Midcontinent Broadcasting Company of Wisconsin, Inc.; *Samuel Miller*, on behalf of Green Bay Broadcasting Company; and *Walter C. Miller*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted September 26, 1972; Released September 28, 1972)

BY THE REVIEW BOARD: BERKEMEYER, PINCOCK, AND KESSLER.

1. This proceeding involves the application of Frank M. Cowles (Cowles) for a construction permit for a new daytime-only standard broadcast station at Green Bay, Wisconsin, on 1080 khz, with 1 kw power utilizing a directional antenna.[1] A petition to deny Cowles' application was filed by Midcontinent Broadcasting Company of Wisconsin, Inc. (Midcontinent), licensee of standard broadcast Station WKOW, Madison, Wisconsin. A petition in support of the petition to deny was filed by Green Bay Broadcasting Company (Green Bay), licensee of standard broadcast Station WDUZ, Green Bay, Wisconsin. By Memorandum Opinion and Order, FCC 70-84, released January 26, 1970, 21 FCC 2d 165, the Commission designated the application for hearing on the following issues:

1. To determine whether the proposed operation would comply with Section 73.37(a) of the Commission's Rules.[2]
2. To determine, in the event the foregoing issue is resolved in the affirmative:

(a) The efforts made by the applicant to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests;

(b) Whether the proposed antenna system can be adjusted and maintained within the proposed limits of radiation; and

(c) To determine in the light of the evidence adduced pursuant to the foregoing [(a) and (b)], whether a grant of the application would serve the public interest, convenience and necessity.

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[1] The applicant originally proposed operation on 1080 khz with power of 5 kw. By Order, FCC 70M-1404, released October 13, 1970, the Administrative Law Judge accepted an amendment to the application which, among other things, reduced the proposed power to 1 kw.

[2] The Commission ordered that, "in the event issue 1 . . . is resolved adversely to the applicant, the application SHALL BE dismissed." 21 FCC 2d at 166. As noted in paragraph 2, *infra*, the issue was resolved in favor of Cowles and no party excepts to this resolution.

2. On December 15, 1971, Administrative Law Judge Millard F. French released an Initial Decision (FCC 71D–96) proposing to deny the application. With respect to Issue 1, the Administrative Law Judge concluded that Cowles' proposed operation would comply with the overlap requirements of Section 73.37(a) of the Commission's Rules. In regard to Issue 2(b), the Administrative Law Judge concluded that Cowles had failed to show that he would be able to adjust and maintain his proposed antenna system. The Administrative Law Judge based this conclusion on the finding that Cowles' study of the day-to-day variations was premised upon zero radiation, an assumption that had no real validity in the Administrative Law Judge's opinion, since, as Cowles' engineer conceded, zero radiation conditions can only be obtained for a short time. Furthermore, although Cowles was aware of potential reradiating objects in the area of the proposed site, he did not submit studies of the effects of the potential reradiating objects on his pattern nor did he introduce evidence on the nature of the detuning devices he intended to employ and how effective they would be. The Administrative Law Judge also resolved the *Suburban* issue (Issue 2(a)) against Cowles.

3. The Administrative Law Judge made the following factual determinations with respect to Cowles' *Suburban* showing: (1) Cowles failed to utilize his Green Bay demographic data to compose his list of community leaders to be interviewed; (2) Cowles' own Green Bay demographic study reveals that he failed to interview an adequate cross-section of leaders from the various economic, social, political and cultural groups and organizations of the community; (3) the Green Bay leaders who supposedly represented some 30 major community organizations were selected primarily because of their personal friendship with Cowles; (4) many of the actual interviews were either "of such brief duration" or so "casual", they produced no meaningful results; (5) the 20 Green Bay contacts who were interviewed were not the original 23 contacts listed in the application which the Commission indicated "may not represent an adequate sampling of the Green Bay area"; (6) none of the 20 contacts appear to be from any of the separate, distinct and sizable communities of De Pere, Allouez, Ashwaubenon, and Howard Village (all in Wisconsin) which are also to be served by the proposed station; (7) the community problems, stated by those interviewed, were summarized into 19 general topics by Cowles; (8) the summary of general topics did not comport with the *Primer's*[3] requirement that ascertained community problems should be listed by the applicant; and (9) Cowles did not propose adequate programming to meet the needs as evaluated.[4]

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[3] *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507 (1971).

[4] Cowles proposed only one one-half hour daily public affairs program entitled "Open Mike" to deal with the ascertained 44 problems; however, as to the time it will appear in the broadcast day, Cowles testified, "[W]hat time of day, we can't tell you. The time of day will be chosen and experimented with . . ." Tr. 253. Cowles also testified that he "was under no obligation to come in with a written exhibit to give complete information about exactly what the programming format was going to be, and precisely how these programs were going to be used to meet the needs and interests determined by the applicant." Tr. 237–238.

4. Cowles has filed 15 exceptions to the Initial Decision (but no supporting brief) which, in sum, urge the Review Board to reverse the Administrative Law Judge's Initial Decision or, in the alternative, to remand the proceeding for further hearing. The Broadcast Bureau filed two limited exceptions which request the Board to reverse the Administrative Law Judge's conclusion that Cowles had not shown that he could maintain his antenna array. In all other respects, the Bureau supports the Initial Decision. Oral argument was held before a panel of the Review Board on August 24, 1972. We have reviewed the Initial Decision in light of Cowles' exceptions, the Broadcast Bureau's exceptions, Midcontinent's reply, the arguments of the parties, and our examination of the record. We find the Administrative Law Judge's findings of fact to be substantially accurate and his conclusions persuasive. Moreover, the Administrative Law Judge has, in our view, adequately dealt with the arguments raised in the exceptions and no useful purpose would be served by further discussion here. Therefore, except as modified in the rulings on exceptions contained in the attached Appendix, the Initial Decision is hereby adopted.

5. Accordingly, IT IS ORDERED, That the application of Frank M. Cowles (BP–17595) for a construction permit for a daytime-only standard broadcast station at Green Bay, Wisconsin, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
SYLVIA D. KESSLER, *Member, Review Board.*

APPENDIX

Rulings on Exceptions of Frank M. Cowles[1]

Exception No.	*Ruling*
1	*Denied.* Contrary to Cowles' argument, the resolution of Issue 2(b) does not depend upon the "qualifications of the expert witnesses." The resolution depends on the evidence presented. It would be inappropriate, in our view, to determine or weigh the relative qualifications of the engineering witnesses for the various parties. The substance of their testimony and the evidence they submitted are the significant factors, not their relative qualifications. See *Cosmos Broadcasting Corp.* (*WSFA–TV*), 21 FCC 2d 729, 758, 18 RR 2d 538, 572 (1970), remanded on other grounds 28 FCC 2d 630 (1971). Besides, all of the engineers who gave testimony in this proceeding were qualified as experts.
2, 6	*Denied.* Although Cowles' engineer admitted that the initial adjustment would be somewhere between zero and 6 mv., Cowles did not present any evidence to establish that the variations in phase and current ratios to be obtained after

[1] Cowles' exceptions violate Section 1.277(a) of the Commission's Rules because *none* of them "contain specific references to the page or pages of the transcript . . ., exhibit or order, if any, on which exception is based." On that basis, the exceptions could be dismissed out of hand. *Cf. Coral Television Corp.* (*WICK–TV*), 29 FCC 2d 266, 233 n. 1, 21 RR 2d 1114, 1119 n. 1 (1971). In addition, some of Cowles' exceptions violate the particularity requirements of Rule 1.277(a). This, too, is a serious defect. However, in spite of the procedural deficiencies, the Board will follow its usual practice of ruling on the merit of the exceptions. See *Long Island Paging*, 30 FCC 2d 405, 413 n. 1, 22 RR 2d 309, 319 n. 1, review denied 32 FCC 2d 216 (1972).

adjustment of the array would not result in values of radiation in excess of the maximum expected operating values.

3---------- *Denied.* The Administrative Law Judge's reliance on *Don L. Huber*, 36 FCC 638, 2 RR 2d 243 (1964), review denied FCC 64-916, released September 21, 1964, to support his conclusion that day-to-day variation studies premised upon zero radiation assumptions has no real validity was not misplaced. See paragraphs 5-7 of the Administrative Law Judge's ultimate findings and conclusions. See also our ruling on Broadcast Bureau Exception No. 1, *infra.*

4---------- *Denied.* The applicant's proposed condition was merely a statement that he would comply with section 73.33(b) of the Commission's rules. Section 73.33(b) requires the applicant to submit to the Commission all necessary data to establish that he has conformed with the terms and conditions of the construction permit. In view of the evidence in this proceeding showing that Cowles could not adjust and maintain his proposed antenna system within the proposed limits of radiation, his application must be denied.

5---------- *Denied.* It is undisputed that potential reradiating objects are in the area and could have a possible effect on the applicant's ability to adjust and maintain his array. The burden was on the applicant to show that those objects would not cause reradiation or that if the objects caused reradiation he could detune them. The applicant did not meet his burden of proof.

7---------- *Denied.* The Administrative Law Judge's finding accurately reflects the record. The fact that Cowles' engineer did not inspect the proposed transmitter site may not be decisionally significant, standing alone. However, it is a relevant consideration in determining whether the applicant has taken adequate steps to meet Issue 2(b). See paragraphs 3-9 of the Administrative Law Judge's conclusions.

8---------- *Granted.* The Board does not believe that the applicant can be faulted simply for not amending his application. The applicant's error was not in failing to amend his application to comply with the *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507 (1971), but in failing to amend the *Suburban* showing in his application to conform with his evidentiary showing. In other words, there was a "variance" between the showing in the application and the showing made at the hearing. Failure by Cowles to conform his application to his evidence is not fatal, however, because the Commission has held in the past that where there are grounds for granting a petition for leave to amend, but one is not filed, the Commission will not penalize the applicant for failure to amend. See *Genkar, Inc.*, 35 FCC 774, 1 RR 2d 766 (1963); *Neil N. Levitt*, 33 FCC 720, 24 RR 384 (1962), 435 F. 2d 68, 19 RR 2d 2071 (1970).

9---------- *Denied* as being without decisional significance.

10---------- *Denied.* The Commission released its Report and Order adopting the *Primer*, *supra*, as "a statement intended to clarify and provide guidelines as to Commission ***policies*** and requirements" in the area of ascertainment of community problems by broadcast applicants. 27 FCC 2d at 650, 21 RR at 1537 (1971). (Emphasis added.) Narrowly speaking, failure to comply with the *Primer* "poli-

cies and requirements" is not the same as a "rule violation"; nonetheless, noncompliance with its terms can result in a failure to meet the minimum standards of the Commission for ascertaining and attempting to meet community needs, and thereby necessitate a denial of the application. See *Harry D. Stephenson and Robert E. Stephenson*, 33 FCC 2d 749, 23 RR 2d 760 (1972). *Cf. Risner Broadcasting, Inc.*, 28 FCC 2d 330, 21 RR 2d 529 (1971).

11 ..... *Denied.* The Administrative Law Judge's conclusion is correct and is based on the record evidence. As noted by the Examiner in his conclusions (paragraph 15), Cowles did not indicate the time segments for his proposed single program intended to deal with community problems nor did he specify the specific problems to be dealt with in the program. (See footnote 3 to this decision.) The Board has held that an applicant's proposal of only one program to deal with ascertained community problems without relating the proposed broadcast matter to particular community problems is an insufficient indicator that the applicant adequately intends to meet ascertained community problems through programming. *Middle Georgia Broadcasting Co.*, 30 FCC 2d 796, 22 RR 2d 524 (1971).

12 ..... *Denied.* The Administrative Law Judge's findings and conclusions with respect to the applicant's public survey are supported by the record.

13 ..... *Denied.* The record clearly shows that the applicant only submitted a list of 19 "topics" rather than setting forth specific community *problems* he ascertained from interviewing community leaders and the public. See Cowles Exh. 4. Although the applicant contended that he ascertained 44 problems, he did not delineate these problems either in oral testimony at the hearing or in his exhibits.

14 ..... *Denied.* The Administrative Law Judge's finding is accurate. See Tr. 286–287, 330.

15 ..... *Denied.* The Administrative Law Judge's conclusion is supported by the record. Furthermore, the record clearly indicates that, not only did the applicant disregard specific guidelines and requirements set out in the Commission's *Primer*, but also disregarded the "spirit" of the *Primer*.

Rulings on Limited Exceptions of Broadcast Bureau

Exception No.	*Ruling*
1, 2	*Denied.* Even though the Bureau concludes that the applicant has not shown he could adjust his array, the Bureau takes exception to the Examiner's conclusion that the applicant has not shown that he could maintain his array, "if adjusted." The engineering witnesses called by intervenors Midcontinent Broadcasting Company of Wisconsin, Inc., and Green Bay Broadcasting Company took the position that zero nulls were unobtainable; therefore, the applicant's zero radiation studies cannot be used to support the applicant's conclusion that he can adjust his array. Cowles' engineer's position was that zero nulls were obtainable, but not for any practicable period of time. Thus, Cowles' variation study, based on zero nulls, has no validity, and Cowles fur-

nished no appropriate study. Since zero nulls are not a practicable figure upon which to base a variation study, some finite value of radiation must be selected on which the parameter variation study can be made. Without knowledge of what the adjustment values will be, no determination can be made with respect to maintaining the array within the specified MEOV. The Administrative Law Judge's citation of *Don L. Huber, supra,* was not misplaced. The applicant in *Huber* also relied on zero theoretical values of radiation in null areas and we held that "No additional evidence was elicited [by the applicant] as to whether the expected variations in phase and current ratios from those to be obtained in the initial adjustment of the array would result in radiations in excess of the maximum expected operating values." 36 FCC at 641, 2 RR at 248–249. (Footnote omitted.) The *Huber* case is therefore definitely applicable here. See also our ruling on Cowles' Exception No. 3, *supra.*

F.C.C. 71D-96

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of FRANK M. COWLES, GREEN BAY, WIS. For Construction Permit	Docket No. 18790 File No. BP-17595

APPEARANCES

Theodore Baron for Frank M. Cowles; *Adrian L. Roberts* for Midcontinent Broadcasting Company of Wisconsin, Inc.; *Samuel Miller* for Green Bay Broadcasting Company; and *Walter C. Miller* for Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER MILLARD F. FRENCH

(Issued December 13, 1971; Released December 15, 1971)

PRELIMINARY STATEMENT

1. This proceeding involves the application of Frank M. Cowles (hereinafter Cowles) for a construction permit for a new standard broadcast station at Green Bay, Wisconsin. As originally filed, the application proposed operation on 1080 kilocycles, with power of 5 kilowatts, utilizing a directional antenna, with daytime-only hours of operation. By order released October 13, 1970, the Hearing Examiner accepted an amendment to the application which reduced the proposed power from 5 kilowatts to 1 kilowatt and modified the proposed directional pattern.

2. The Commission designated the application for hearing on January 26, 1970 on the following issues:

> 1. To determine whether the proposed operation would comply with Section 73.37(a) of the Commission's Rules.
> 2. To determine, in the event the foregoing issue is resolved in the affirmative:
> (a) The efforts made by the applicant to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests;
> (b) Whether the proposed antenna system can be adjusted and maintained within the proposed limits of radiation; and
> (c) To determine in the light of the evidence adduced pursuant to the foregoing [(a) and (b)], whether a grant of the application would serve the public interest, convenience and necessity.

3. Regarding Issue 1, the Commission indicated that if that issue is resolved adversely to the applicant the application will be dismissed. Regarding Issue 2(a), the Commission said: "* * * Although Cowles appears to have made an extensive survey to ascertain the community needs and interests, he has not listed by name the individuals contacted, adequately listed the suggestions received, or the

programming proposed to meet the needs as evaluated. Moreover, it appears that the number of people contacted may not represent an adequate sampling of the Green Bay area and it also appears that the persons who were contacted may not be an adequate cross-section of that community." The designation order made Midcontinent Broadcasting Company of Wisconsin, Inc. and Green Bay Broadcasting Company, licensees of standard broadcast stations WKOW (now WTSO) of Madison, Wisconsin, and WDUZ of Green Bay, Wisconsin, parties to the proceeding.

4. Prehearing conferences were held on May 5, June 15 and 25, July 30 and September 29, 1970, and on February 3, 1971. Hearings were held on December 8, 1970, and on April 6, June 16 and 17, 1971. The record was closed on June 17, 1971. Proposed findings and conclusions were filed by all parties on September 17, 1971, and replies were filed by Midcontinent on October 5, 1971 and by the applicant on October 6, 1971.

FINDINGS OF FACT

5. As previously noted herein, Cowles proposes a new station on 1080 kilocycles, with power of 1 kilowatt, utilizing a directional antenna, daytime-only hours of operation, at Green Bay, Wisconsin. The Cowles antenna-transmitter site is located about east of the community of De Pere, Wisconsin, on Hoffman Road, 1.3 miles east of Webster Avenue. The geographical coordinates are: North latitude–44°27′18″, West Longitude–88°00′50″. The directional array consists of three towers to be erected on a line bearing N 15° E. Cowles proposes to operate at Green Bay (population 87,809), which is the county seat of Brown County (population 158,244). It is the central city of the Green Bay Standard Metropolitan Statistical Area that is comprised of Brown County. Three standard broadcast stations are authorized to Green Bay, namely, WBAY (1360 kHz, 5 kw, DA–N, U, III), WDUZ (1400 kHz, 250 watts, 1 kw–LS, U, IV), and WNFL (1440 kHz, 500 watts, 5 kw–LS, DA–2, U, III). In addition, two FM stations operate there, namely, WBAY–FM (101.7 MHz, 100 kw, 1080 ft., C) and WDUZ–FM (98.3 MHz, 3 kw, 295 ft., A). Three TV stations are also authorized to the community. They are WBAY–TV (Ch. 2, 100 kw, 1200 ft.), WFRV–TV (Ch. 5, 93.3 kw, 1120 ft.) and WLUK–TV (Ch. 11, 316 kw, 1260 ft.).

Issue 1—Compliance With 47 CFR 73.37

6. Cowles filed an engineering amendment to his application on July 27, 1970 and a supplement thereto on August 14, 1970, which reduced his power from 5 kilowatts to 1 kilowatt and modified his proposed directional antenna system. Cowles' amendment further restricted radiation from his proposal in the direction of Station WKOW, Madison, Wisconsin (1070 kHz, 5 kw, 10 kw–LS, DA–2, U, II). By employing joint field intensity measurements taken by Cowles and Station WKOW to locate the WKOW 0.5 mv/m contour in the direction of Green Bay, and by using the proposed maximum expected operating values (MEOVs) of radiation in conjunction with

ground conductivity values taken from Figure M–3 to locate the proposed 0.5 mv/m contour in the direction of Station WKOW, it was determined that no prohibitive overlap of these contours would occur if the antenna system can be adjusted and operated within the specified MEOVs.

Issue 2(b)—Adjusting and Maintaining the Proposed Antenna System

7. Cowles' proposed directional antenna system consists of three elements in line with quarter wave (90°) antenna heights and spacing between elements. The parameters are as follows:

Tower	Current radio	Relative phase (in degrees)
Northeast	1.0	−106
Center	1.92	0
Southwest	1.0	+106

His pattern has an RMS value of 186 mv/m and an RSS value of 194 mv/m. It is designed to provide maximum radiation in a north-northeasterly direction at azimuth of 15 degrees true where the effective field in the major lobe is 313.48 mv/m. Toward the south-southwest in the general direction of Station WKOW, the radiation pattern has two minor lobes and three nulls. Applicant's consulting engineer proposes to adjust to less than 6 mv/m, and as close as possible to zero, in the null sectors, and to the calculated values of radiation in the minor lobes where the maximum values are 6.52 mv/m.

8. Calculations were placed in the record which show that if the array is adjusted to produce the calculated values of radiation, a variation in the parameters under a "worst case" combination of 1% in current amplitude and 1° in phase deviation would result in radiation values that would not exceed the MEOVs toward Station WKOW. The calculations further show that the maximum variation without the MEOVs being exceeded is slightly less than 1.3% and 1.3°. In the opinion of one of the respondent's consulting engineer, i.e., the engineer for Station WDUZ, Green Bay, Wisconsin, a more realistic "worst case" of parameter variations is 2% and 2°. It was also WDUZ's opinion that a more realistic approach to directional antenna design is to assume a certain amount of "null fill" and then to calculate the effects of parameter variation. The engineer felt a reasonable amount of null fill for the proposed array, considering the effects of known and unknown factors, would be 5 mv/m per kilowatt. Using assumed parameters to obtain such null fill, he found that the maximum adverse variations in those parameters that would be permissible without exceeding the proposed MEOVs would be on the order of 0.3% in current ratio and 0.3° in phase. If these parameter were varied as much as 2% and 2° adversely, the MEOVs would be exceeded by as much as 5.38 mv/m in the direction of 225° true. Inasmuch as the assumed parameters and pattern are not proposed by the applicant, little weight can be attached thereto.

9. Applicant proposes a general design of the antenna installation that will be conservative for maximum stability. Tuning houses will have thermostatically controlled temperature. Phasing and coupling components will include vacuum capacitors, and the system will be designed for maximum stability. Transmission and sampling lines will be temperature stabilized and sampling lines will be of equal length. Towers will be spot-welded at each section. The ground system will include a ground screen at the base of each tower. The phase monitor will be a Potomac Instrument Model AM–19, or equivalent, with a phase measurement absolute accuracy of plus or minus 1 degree, with 0.5 degree resolution, and current indications of plus or minus 1.5%, and 0.5% resolution. Antenna coupling apparatus will provide for non-directive operation during the proof-of-performance. Monitoring points are proposed at azimuths 195°, 217° and 245° east of true north. During initial adjustment, the pattern will be that affording the closest approach to the theoretical pattern.

10. At the December 8, 1970 hearing, the question of possible reradiating objects in the vicinity of the site arose. At that time Cowles' consulting engineer admitted he had not personally visited the site. However, he indicated that he had inspected a topographic map and that map had not shown any possible reradiating objects in the site's vicinity. Although he further stated that the aerial photograph accompanying the application disclosed no structures that would indicate the possibility of reradiation problems, he readily admitted the photograph was from such a height that the site was relatively distant.

11. Before WDUZ presented its detailed evidence showing the potential reradiating objects in the vicinity of the proposed site, Cowles' consulting engineer testified that assuming there were high tension lines or towers which might reradiate, the matter could be solved by detuning. Although there could be residual radiation effects after detuning, he said he did not find this in all cases. When asked about WCAR in Detroit, a nine-tower array he had previously worked on, he said that any residual effects that may have been present caused no difficulty. He concluded that the proposed antenna system can be adjusted and maintained within the proposed antenna limits of radiation.

12. After the presence of the high tension lines, other radio towers and certain other potential reradiating objects were brought to his attention, Cowles' engineer testified that he would have no concern about reradiation from any other radio station because it could be corrected completely if it did exist. The water tank, he said, did not appear to be a probable source of trouble because it was not directly in the sector of maximum radiation from the proposed antenna system. The only power line which he would regard seriously is the line supported by wooden poles to the northwest; however, he stated that he had no way of knowing exactly what the effect would be. He subsequently reaffirmed his opinion that the proposed antenna system can be adjusted and maintained within the proposed limits of radiation.

13. However, at the same December 8, 1970 hearing session, and after respondent WDUZ had submitted evidence on reradiating objects in the site's vicinity, Cowles asked for " * * * the opportunity to investi-

gate it and determine the facts." In support of this belated request he argued that the possibility that such objects existed had only recently been called to his attention and that "The Commission certainly is entitled to have the best specific facts and evidence about location and dimensions and the nature of the possible reradiators and their effect on the proposal." He also stated that he would consider presenting evidence on what to do about any effects which might be discovered. He further agreed to present these additional facts in written form and exchange them in advance. This request was granted.

14. Subsequently, Cowles took the position that upon review of the material previously presented " * * * that the applicant does not propose to offer any exhibits unless somebody requests them to, in which case we would be happy to oblige. But we do not intend to offer written exhibits." He said he would merely have a half-dozen questions of his consulting engineer, and that would complete his record presentation on the matter. Later, Cowles' counsel indicated that he didn't intend to call his engineering witness, but that he was available in case anyone wanted to cross-examine him further. Consequently, the only specific facts and evidence on the reradiation question were data submitted by respondent WDUZ.

15. WDUZ's consulting engineer indicated that he has visited the proposed transmitter site on December 6, 1970, and again in January 1971. Consequently, he not only introduced evidence on the stability question, but also on reradiating objects in the vicinity of the proposed transmitter site. His topographic map, as supplemented by his testimony, shows the presence of a water tank mounted on four steel legs 90 to 100 feet high, located about 1.5 miles to the northwest, the three-element directional antenna system of Station WNFL about 1.8 miles to the north-northeast, the antenna system of Station WBAY about 3.3 miles to the southwest of the proposed site, and three TV towers and antenna system of Station WDUZ about 4.5 to 5 miles of the site. He also indicated that there were three transmission lines in the area and he submitted photographs of the supporting structures of two of these lines.

16. One of the transmission lines, owned by the Wisconsin Public Service Corporation, runs in a northeast-southwest direction crossing Hoffman Road about 0.2 mile northwest of the proposed transmitter site. It consists of double wooden poles 55 feet high and 20 feet apart with bracing three-quarter way up and a cross-arm near the top supporting three service wires and two ground wires, all spaced 10 feet 8 inches. Each set of double poles is spaced 537 feet from the next set. A ground wire runs down the length of each pole. A second power line, owned by Wisconsin-Michigan Public Service Corporation, runs in a northeast-southwest direction passing about 0.75 mile southeast of the proposed site at the nearest point. It consists of 80-foot steel towers with four legs supporting three service wires (three more to be installed in 1971) and one ground wire with 13-foot vertical spacing and 20 to 27-foot horizontal spacing between wires. The bottom conductor is 45 feet above ground. The towers are spaced 600 feet. The ground wires are directly attached to each tower and each tower is grounded at the base. The second line converges with the first line at a point 1.8 miles

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northeast of the proposed site and the two lines then continue on in a northeasterly direction. A third transmission line runs in a northwest-southeast direction about 2.5 miles east of the proposed site. It converges with the other two at a point 2.5 miles northeast of the proposed site and all three continue on in a northeasterly direction.

17. WDUZ's consulting engineer contended that power lines can cause distortion and null-fill in a directional antenna pattern in that voltages induced in the towers or, in the case of wooden supporting poles, in the vertical ground drops, cause current to flow in closed loops formed by the towers or vertical ground wires and the horizontal grounding wires connecting the tops of the towers or poles. He further claimed that various detuning procedures have been attempted to reduce the effect of radiation from power lines but that, in his experience, detuning is not always possible and does not always fully eliminate the effects of reradiation. Because of the presence of the aforementioned lines and the fact that under actual conditions true zero nulls cannot be realized, he did not believe that the proposed adjustment can be achieved.

18. WKOW's consulting engineer noted that, in the applicant's stability study, no special consideration was given to the effects of reradiation or the nature of the terrain in the area which might alter the conclusions which were based upon an ideal environment. He claimed that two high tension lines are potential sources of reradiation and that their presence so close to the proposed directional antenna system, coupled with the anticipated effect of other environmental influences, would be expected to introduce unwanted "fill" in the regions of high suppression and reduce the percentage deviation in operating parameters which would be permissible without exceeding the maximum expected operating values (MEOV) of radiation specified. He further submitted that the study did not take into account the magnitude of the expected departure of the initial measured field values from those theoretically calculated and, thus, it is not possible to determine from the applicant's engineering statement the magnitude of the variations in operating parameters actually permissible and whether the monitoring system, as proposed, is capable of detecting these small operating parameter variations which could result in interference to the WKOW service area. He further added that the data is insufficient to permit the establishment of suitable conditions in the station's construction permit to assure such protection under these environmental conditions.

19. In reference to the possibility of detuning reradiating objects, WDUZ's consulting engineer stated that he knows from past experience that the permission of the power companies involved must be obtained before their high tension lines can be detuned; that such approval be obtained in writing; and that some times these power companies even insist that their own men do the work. Applicant Cowles' consulting engineer admitted that he has not sought permission to detune from either the Wisconsin Public Service Corporation or the Wisconsin-Michigan Public Service Corporation. He further admitted that he had not even visited the site *subsequent* to the December 8, 1970 hearing session wherein it was first disclosed that reradiating objects existed in the vicinity of the site.

Issue 2(a)—Ascertainment of Needs Issue

20. As previously noted, when the Commission designated the ascertainment of needs issue against Cowles, it indicated that Cowles had not listed by name the individuals contacted, that he had not adequately listed the suggestions received, and that he had not adequately set out the programming proposed to meet the needs as evaluated. Moreover, the Commission further stated "that the number of people contacted may not represent an adequate sampling of the Green Bay area" and that "it also appears that the persons who were contacted may not be an adequate cross-section of that community."

21. Because of the pendency of the Commission's final *Primer* on ascertainment of needs, Cowles decided to await the release of the *Primer* and after release thereof he elected to exercise his right to amend his application. However, Cowles never sought permission to amend his hearing application. Nor has he ever served any copies of an amendment upon the parties to the proceeding.

22. Turning to the Commission's inquiry into whether the applicant has adequately sampled the Green Bay area, Cowles presented demographic data showing the composition of Green Bay and De Pere as required by the *Primer*. However, Cowles admitted that he made no use of that data in arriving at his decision on which community leaders should be interviewed, and that in fact the list of prospective interviewees was drawn up before the demographic data were obtained. Two witnesses testified regarding the ascertainment of needs issue; i.e., the principal, Frank Cowles, and his proposed station manager, Donald Love. However, for the purpose of these findings, the interviews, or lack thereof, will be referred to as Cowles' efforts.

23. Comparing the demographic data submitted, with the individuals and organizations interviewed, shows that Green Bay is the county seat of Brown County. The county government has recently been revised with the election of a County Administrator. Brown County is one of only three other counties in Wisconsin to effect this new concept in county government. The County Administrator works in conjunction with a County Board which is composed of 58 members who represent precincts of the county. The County Board is also unique in that the 28 members of the city council serve a dual role since they represent their wards on both the city council and the County Board. Cowles did not interview the County Administrator, any of the 58 county council members, or any of the 28 city council members.

24. Green Bay is also the center for the distribution area in Northeastern Wisconsin and is commercially known as the Cheese Processing Capital and Tissue Paper Capital of America. Cowles made no effort to interview any representatives of the Cheese Processing Industry, and aside from a futile attempt to contact a Mr. Cofferin, President of Fort Howard Paper Company, Cowles made no effort to contact any members of the Tissue Paper Industry. Also, there are at least seven or eight paper and paper-product producing companies in Green Bay; yet, aside from an unsuccessful attempt to contact a Mr. Kress, the Chairman of the Board of Green Bay Packaging, Cowles made no attempt to interview any representative of that industry. However, he subsequently pointed out that although Joseph Delveaux

was interviewed in his capacity as Secretary of a local chapter of a labor union, he is also an employee of Green Bay Packaging.

25. The Green Bay public school district has four senior high schools, four junior highs, and twenty-six elementary schools. The 1969–1970 public school enrollment was approximately 21,976. The staff includes 1,095 professional employees and 814 clerical, maintenance, and food service workers. The Green Bay school district also has a parochial school enrollment of 8,565. Cowles interviewed no students or student leaders. He interviewed no school administrators and, other than his interview with Mr. Sladky, chairman of the Green Bay School Board, he interviewed no one connected with the Green Bay public school system. And aside from interviewing Bishop Aloysius J. Wycislo, the titular head of the Green Bay Diocese, he interviewed no one connected with the parochial school system.

26. The religious needs of Green Bay are served by 77 churches representing all of the major faiths. Aside from his interview of Bishop Wycislo, Cowles conducted no interview of Green Bay's religious leaders. Cowles further stated that he attempted to interview the head of the Brown County Ministerial Association, but was unsuccessful.

27. The University of Wisconsin has located a new 600-acre campus in Green Bay. Three buildings on the new campus opened in the fall of 1969, and enrollment for the 1969–1970 season was 2,100. Cowles made no attempt to contact any students or student leaders at the University, and aside from an unsuccessful attempt to contact both the Chancellor and the Vice Chancellor of the University, no attempt was made to contact any officials, educators or professors.

28. There are three hospitals, 121 doctors and 70 dentists in Green Bay. Cowles interviewed one doctor and no dentists. The Green Bay City Police Force has 136 men and operates 34 motor vehicles. Aside from an unsuccessful attempt to interview the Chief of Police, no officials of the police force were interviewed. The Green Bay Fire Department has a 181-man force, six stations and 23 motor vehicles. The only person Cowles interviewed was Gerald Selissen, a member of Fireman Local Union No. 141. While Love claims that Frank Cowles interviewed the Fire Chief, David Zeigmiller, there is no indication that David Zeigmiller was interviewed. Moreover, it appears that Frank Cowles' conversation with the Fire Chief was merely for the purpose of determining who in the Fireman's Union he should interview.

29. Green Bay has one of the finest harbors of the Great Lakes. The marine tonnage entering the harbor has annually averaged more than 2,800,000 tons. The Fox-Wolf Rivers are maintained for the operation of barge lines inland for a distance of 100 miles serving such cities as Appleton, Neenah, Menasha, Oshkosh, and New London. Three railroads provide freight transportation and passenger service. Twenty-four truck lines, operating out of twelve terminals, offer daily freight service, within the city and throughout the nation. There are three airports in Brown County. One of those airports—Austin Straubel Field—is operated by Brown County and is the third largest airport in the State of Wisconsin. Although the Green Bay Port Commissioner was included on the list of people to be interviewed, Cowles never got

around to interviewing him. In any event, Cowles contacted no one involved either as an owner or employee of any transportation facility.

30. Green Bay is the home of the professional football Green Bay Packers. The Packers have captured the world's championship in the National Professional Football League eleven times (1929, 1930, 1931, 1936, 1939, 1944, 1961, 1962, 1965, 1966 and 1967). They also held the Super Bowl Championship in 1966 and 1967. The Packers, worth thousands of dollars to the city in publicity each year, are operated by a non-profit organization, The Green Bay Packer Corporation, made up of local civic-minded business and professional men. Although Cowles intended to interview Mr. Olejnizak, President of The Green Bay Packer Corporation, Olejnizak was not in the city at that time. So no one was interviewed. Nor was any member of the football team itself interviewed.

31. Cowles made no attempt to interview the Green Bay city clerk, the city attorney or the city engineer. However, Cowles says he did not interview the city clerk because he is new. There are a number of federal offices located in Green Bay, but Cowles contacted no federal officials. The public library, operated by the county at four locations, has a collection of 238,189 volumes. A traveling "bookmobile" also serves Brown County residents, yet Cowles interviewed no officials of that library system.

32. Cowles indicated that if his application were granted, he would serve Metropolitan Green Bay which includes Green Bay (population—87,809), De Pere (population—13,309), and all of Brown County (population—158,244). Other communities in Brown County include the following along with their 1970 census population figure: Allouez—population 13,753; Ashwaubenon—10,042; and Howard Village—4,911. Consequently, Cowles submitted certain demographic data on the composition of De Pere as well as Green Bay and Brown County.

33. De Pere has a mayor-alderman form of municipal government. The eight aldermen and the mayor are elected for terms of two years. Cowles did not interview the mayor or any of the eight aldermen. De Pere boasts one of the best integrated school systems in the nation. Cowles interviewed no one from that school system. Later Love pointed out that James DeLorme, who was interviewed in his capacity of Chairman of the Brown County Democratic Party, is also an instructor at De Pere High School. While Love asserts that the interview included a discussion of problems in the field of education, Green Bay Broadcasting's counsel claimed that this fact did not appear in the notes which were made up at the time of the interview. Cowles Exhibit 5 bears out Green Bay Broadcasting's contention to the extent that no De Pere community or high school problems were discussed. In fact, Cowles admitted that the only De Pere resident ever contacted was Judge James Byers who was interviewed in his capacity of Judge, Brown County Court, Branch 2. With respect to Cowles' failure to interview but one community leader in De Pere it is noted that no AM or FM radio station is assigned to that community.

34. De Pere has fourteen major manufacturers producing such items as dairy products, furniture, iron castings, tile and other clay products, paper products, and equipment for industry and farming.

As the center of dairy-rich Brown County, De Pere's stable economy also depends on agricultural products. In 1970, the county had 1,941 farms with an average of 132 acres. There are 42,500 milk cows producing 408,000,000 pounds of milk. Agriculturally, hay, oats and corn are the county's main crops. In Brown County, 2,776 acres of land were used for vegetables. Cowles never interviewed the county agricultural agent. Regarding the dairy industry, Cowles made no attempt to contact either any owners or workers in the industry.

35. As previously noted, there are at least three other substantial communities in Brown County; i.e., in the area Cowles proposed to serve. Allouez (population—13,753) is contiguous to Green Bay and borders on the east side of the Fox River to the south-southwest. It has a township form of government composed of a township chairman and two members. It has its own planning commission and its own Police and Fire Departments. It is part of the Green Bay Sewage District and the Green Bay High School District. There are no AM or FM stations assigned to Allouez, and Cowles contacted no community leaders from there.

36. Howard (population—4,911) is contiguous to Green Bay on the west side of the Fox River to the west and northwest. It also belongs to the Green Bay High School and Green Bay Sewage Districts. It exists as a separate township. There is no AM or FM station assigned to Howard. Aside from Senator LaFave, who represents that portion of Brown County where Howard is located, Cowles interviewed no community leaders from Howard.

37. Ashwaubenon (population—10,042) is contiguous to Green Bay and lies directly to the southwest. It has its own Town Board and Town Clerk. It exists as a separate school district. However, it belongs to the Green Bay Sewage District. It has no AM or FM radio station. Cowles contacted no community leaders from Ashwaubenon.

38. In its designation order, the Commission stated that "it also appears that the persons who were contacted may not be an adequate cross-section of that community." Cowles' original application shows that he had surveyed the following 23 organizations and persons: (1) Green Bay Board of Education; (2) League of Women Voters; (3) University of Wisconsin-Green Bay Center; (4) Greater Green Bay Chamber of Commerce; (5) U.S. Naval and Marine Reserve; (6) U.S. Air Force Recruiting; (7) Humane Society and Animal Shelter; (8) American Red Cross; (9) Wisconsin State Highway Department; (10) Wisconsin State Conservation Commission; (11) Y.M.C.A.; (12) Y.W.C.A.; (13) Brown County Ministerial Association; (16) Catholic Diocese of Green Bay; (17) Green Bay Apostolate; (18) Lutheran Welfare Service of Wisconsin; (19) Wisconsin Department of Public Welfare; (20) Green Bay City Clerk; (21) Green Bay City Attorney; (22) Green Bay Engineer; and (23) Green Bay Fire Chief.

39. In order to determine which community leaders to interview, the applicant, Frank Cowles, his proposed general manager, Donald Love, and his local counsel, Mr. Pressentin, made a master list of people they felt were important in Green Bay. All three men participated in the process of selecting the individuals to be interviewed. This

master list contained about 30 names which in Cowles' and Love's judgment represented the most important community organizations in the Green Bay area. In deciding the individuals to be included on the list, Cowles did not have as a reference a list of the organizations in Green Bay because he knew which ones were there.

40. However, Cowles did not interview the 30 names on his master list, because he says he was unable to interview 10 of them since "most of them were out of town." When asked if he didn't try to contact someone else at the pertinent organizations and institutions, Cowles said, "I didn't try to do that. I figured I'd either go to the people that I know, friends of mine, or just not at all." Cowles further concedes that there was no attempt to contact community leaders prior to the last week before the *Primer* amendment was due.

41. The record reflects that there are numerous organizations and institutions in Green Bay that were never contacted. For example, no interviews were conducted with any representative of the following: (1) Rotary Club; (2) Civil Defense Organization; (3) Y.M.C.A.; (4) Y.W.C.A.; (5) Knights of Columbia; (6) Urban Renewal Committee (however, it appears that interviewees Robert Houle and Mayor Donald Tilleman, in addition to their positions shown on Cowles Exhibit 3, were also members of the Urban Renewal Commission); (7) Northeast Wisconsin Health Planning Council, but Dr. Bruce Stoehr is the head of the Council; (8) Creative Workshop of Green Bay; (9) Symphony Orchestra; (10) Kiwanis Club; (11) Optimist Club; (12) any of the women's clubs, i.e., Service League; (13) B'nai B'rith; (14) Civil Music Association; (15) League of Women Voters; (16) Brown County Conservation Society; (17) Brown County Historical Society; (18) Brown County Dentist Society; and (19) Brown County Bar Association. Cowles purposely did not contact any presidents or chairman of any bank boards "* * * because I am on a board myself. I didn't think that was the right thing to do, so I didn't."

42. With respect to the 20 community leaders interviewed, Love conducted twelve of the interviews and Cowles the other eight. All of Cowles' contacts were face-to-face and varied in length as follows: One-half hour with Tilleman, two or three minutes with Froelich, five minutes with Stiles ("while we were walking down the street"), ten or fifteen minutes with Bourgnignon ("just general discussion and talk"), an undetermined amount of time with Skenendore (while Skenendore was giving Cowles a haircut), fifteen or twenty minutes with Holloway, "quite a while" with Selissen, and perhaps ten minutes with Sladky. With respect to Love's contacts, seven were by telephone, and consumed from three to six or seven minutes.

43. The public survey was conducted by having five women telephone, on a random basis, private residences listed in the Greater Green Bay Telephone Directory, which covers the communities of Green Bay, De Pere, Howard, Ashwaubenon, and Allouez. No attempt was made to have a proportionate number of responses from each of the five communities. A total of 347 calls were made. Of those, 215 expressed an opinion, 72 had no opinion, and 60 either did not answer or refused to talk.

44. To meet the *Primer* requirement that all ascertained community problems should be listed, Cowles submitted a one-page exhibit entitled "Community Problems Perceived by Community Leaders in Green Bay, Wisconsin, Area." However, the exhibit shows that the applicant did not list all of the community problems that were ascertained, i.e., that 44 community problems were ascertained but only 19 were listed. At first, Cowles contended that many of the 44 problems were duplicated by several of the individual interviewees and that the 19 problems enumerated represent the specific problems that were identified and not duplicated. Later, however, he admitted that the 19 items enumerated in the exhibit were not the community problems that were ascertained but were merely topics which covered any number of ascertained problems. For example, some of the 19 topics set out in the exhibit are "government," "youth problems," "education," "geriatrics," etc. Cowles admitted that numerous problems could be classified under these headings. Thus, he admitted that his list of 19 topics was not a list of all the community problems he has ascertained but merely a summary of those problems.

45. With respect to his community leader survey, Cowles admitted that he made no evaluation of the ascertained community problems but instead presumed that all the problems were of equal validity. However, insofar as the general public is concerned, Cowles stated that he intended to give additional consideration to the problems that represented the greater number of responses.

46. Regarding the Commission's inquiry into whether Cowles has adequately set out programming proposed to meet the needs as evaluated, the Commission's *Primer* at Question and Answer 39 says:

"Question: In the application, must there be a showing as to *what* broadcast matter the applicant is proposing to *what* problem?

"Answer: Yes. See Public Notice of August 22, 1968, FCC 68-847, 13 RR 2d 1303. The applicant should give the description, and anticipated time segment, duration and frequency of broadcast of the program or program series, and the community problem or problems which are to be treated by it. * * * "

47. Cowles takes the position that "On the basis of the foregoing survey to ascertain community problems, the applicant, Frank M. Cowles, does not propose to change the programming contained in his pending application." Cowles' application does not attempt to relate his proposed programming to any specified needs. Instead it shows only that aside from some editorials, Cowles will broadcast a one-half hour daily public affairs program entitled "Open Mike."

48. Cowles takes the position that he "was under no obligation to come in with a written exhibit to give complete information about exactly what the programming format was going to be, and precisely how these programs were going to be used to meet the needs and interests determined by the applicant." Moreover, Cowles contends that the *Primer* does not require him to list specific programs or the time segment for such programs if he has a daily program designed for public affairs generally. In fact, on the question of specifying a time segment, Cowles said, "We are not specifying now, and will not, and cannot realistically specify to the Commission, a period of 10:30 to 11:30 or whatever because, as a practical matter, it is going to

be determined by what is being done in the way of broadcasting in the community at the time." Thus, on the question of the time segment of his only public affairs discussion program, i.e., Open Mike, Cowles says "What time of day, we can't tell you. The time of day will be chosen and experimented with and will depend upon what we find is a practical matter."

ULTIMATE FINDINGS AND CONCLUSIONS

1. Frank Cowles seeks authorization to construct and operate a new Class II standard broadcast station at Green Bay, Wisconsin, on 1080 kilocycles, 1 kilowatt, daytime only, employing a directional antenna. Green Bay, Wisconsin (population 87,809) is the county seat of Brown County (population 158,244) and the central city of the Green Bay Standard Metropolitan Statistical Area. Three unlimited time AM, two FM and three TV stations operate there. Midcontinent Broadcasting Company of Wisconsin, Inc. and Green Bay Broadcasting Company, licensees of Stations WKOW, Madison, and WDUZ, Green Bay, respectively, are parties to the proceeding.

Engineering Issues

Issue 1—Compliance With Section 73.37(a)

2. Originally Cowles sought 5 kilowatts power. Subsequently he amended his application to reduce power to 1 kilowatt and modified the directional antenna system. As a result of said amendment, the problem of prohibitive overlap of the 0.5 mv/m contours with Station WKOW has been removed. Thus, it is concluded that Cowles' proposal complies with the overlap requirements of Section 73.37(a) of the Commission's Rules.

Issue 2(b)—Adjustment and Maintenance of Antenna System

3. Cowles has proposed a directional array located in a rather severe natural environment that can intensify the normal day-to-day variations in operating parameters, and which is also located in close proximity to power lines and other potential objects that can reradiate the station's signal and cause unwanted fill in the null areas of the pattern. While Cowles' engineering consultant had no concern about some of the reradiating objects, he did regard seriously certain of the high tension lines. He indicated he did not at that time know what the exact effect would be and asked for a further opportunity to investigate and determine the facts. He was afforded this opportunity.

4. However, Cowles' consulting engineer did not visit the proposed transmitter site either before or after the presence of the reradiating objects were called to his attention. Moreover, he admitted that he had not tried to obtain permission from either the Wisconsin Public Service Corporation or the Wisconsin–Michigan Public Service Corporation, the owners of the high tension lines in question, to determine their willingness to permit detuning. No studies were submitted by the applicant concerning any of the potential reradiating objects, no detailed information was submitted as to the design of detuning devices

that would be required, and employed, if found necessary, and no evidence was offered as to whether, in the event problems of reradiation from the power lines or supporting structures arose, permission and cooperation of the public service companies owning and operating the lines could be obtained.

5. Cowles' study of the day-to-day variations that could be expected in field ratio and phase assumed that the pattern would initially be adjusted to zero radiation in the null directions. The engineers for WKOW and WDUZ expressed strong opinions that such an adjustment was impossible. Cowles' own engineer admitted that the zero radiation condition could only obtain for a matter of minutes or hours and finally conceded that the initial adjustment would actually lie somewhere between zero and six millivolts. Thus, Cowles' variation study based upon the zero radiation assumption has no real validity, and no conclusions can be drawn from it as to what magnitude of variations are allowable without exceeding the MEOVs, or what type of monitoring system would be sufficiently precise to measure the variations.

6. The type of infirmities in Cowles' showing were also present in the case of *Don L. Huber*, 2 RR 2d 243 (1964), involving an application to operate on 920 kilocycles with power of 1 kilowatt, directional antenna, daytime, at Madison, Wisconsin. The applicant's three-tower array would produce a pattern with three minor lobes of radiation. With respect to the values to which the array would be adjusted in the null regions, the applicant's engineer stated that, although the array could not be adjusted to the theoretical values, it would be adjusted to obtain values below the MEOVs. How much below was not indicated. The Review Board noted that, since the initial adjustment was not specified, there was no evidence as to whether the expected variations in the phase and current ratios would result in radiations in excess of the MEOVs. This was a major factor in the Review Board's denial of the proposal for failure to show that the array could be adjusted and maintained.

7. It is also noted that in that case, the Review Board characterized the array as a "critical one" because variations in phase of plus or minus 1° and in current ratios of plus or minus 2% from the theoretical values would result in radiations in excess of the MEOVs. Cowles' variation study, even utilizing the impossible zero radiation assumption, revealed that MEOVs would be equaled with a "worst case" of only 1.1° and 1.1%. By this standard, Cowles' array is a very critical one.

8. Even accepting the proposition that Cowles' engineering consultant knows methods which could be used to detune the reradiating objects in the vicinity, thereby reducing such reradiation to an acceptable level, Cowles has not shown that he has the permission to detune the towers. He was given a full opportunity to obtain the requisite approvals to detune, and he failed to provide them.

9. Based on the foregoing ultimate findings, it is concluded that Cowles has failed to meet the burden of proof on the adjustment and maintenance of the antenna array, and, consequently, his application

must be denied. Assuming *arguendo* that Cowles can adjust and maintain his antenna array as proposed, ultimate findings and conclusions will be made on the ascertainment of community needs issue.

Issue 2(a)—Ascertainment of Needs

10. In its designation order, the Commission pointed out, *inter alia*, (a) that Cowles may not have interviewed an adequate cross-section of the community; (b) that the number of people contacted, i.e., 23 people, may not represent an adequate sampling of the Green Bay area; (c) that Cowles had not listed the suggestions received; and (d) that he had not adequately set out the programming proposed to meet the needs as evaluated.

11. Because of the pendency of the Commission's *Primer* on the ascertainment of needs. Cowles elected await the release of that *Primer*, and indicated he would exercise his right to amend his application. However, Cowles did not properly implement that right. Section 1.522 of the Commission's Rules contemplates that changes in application material after hearing designation are to be accomplished by submitting an amendment with a petition to the Hearing Examiner for leave to amend, with service of the petition on all parties. The Commission's Report and Order in Docket No. 18774 affirmed that Section 1.522 was to be followed in submitting amendments in hearing cases under the ascertainment issue, and specified a May 24, 1971, deadline for such amendments unless extended by the Hearing Examiner. Counsel for the other parties were never served with a petition for leave to amend the applicant's ascertainment showing and no order was ever issued by the Examiner extending the date to do so.

12. Aside from the above procedural deficiency, Cowles fails to meet many of the requirements of the Commission's *Primer*. For example, the *Primer* provides that the community composition data shall be used to select those leaders who are to be consulted. Although Cowles secured data on the composition of Green Bay, De Pere, and Brown County, and presented it in evidence, he never used that data to help select the community leaders to be interviewed, because the list of community leaders to be interviewed was drawn up before the compositional data was ever obtained. Even in terms of his own demographic data, Cowles has failed to show an adequate cross-section of consultations with leaders of groups and organizations that represent various economic, social, political, cultural and other elements of the community. The record shows that there are at least 30 important organizations in Green Bay, and Cowles had made up a master list of 30 people or organizations to be interviewed which he felt were a necessary part of the cross-section of his service area. Yet he failed to interview ten of them because "most of them were out of town" at the time he conducted his interviews. In addition, Cowles' failure to interview any member of many of these organizations was due to the fact that he had no available friends in that particular organization. And he said, "I figured I'd either go to the people that I know, friends of mine, or just not at all." Furthermore, some of the contacts or interviews were of such brief duration, and in such casual manner, as hardly to be worthy of the name.

13. It is noted that in the designation order the Commission pointed out that the 23 contacts Cowles originally relied on may not represent an adequate sampling of the Green Bay area; i.e., Green Bay (population 87,809), Brown County (population 158,244) and De Pere (population 13,309). Cowles now relies on a survey where only 20 people were interviewed. Evidently Cowles no longer relies on his original 23 contacts, which did not list the name of the individuals interviewed, because there is little similarity between the two lists. Also, Cowles failed to interview leaders representing organizations connected specifically with the separate, distinct and sizable communities of De Pere (13,309), Allouez (13,753), Ashwaubenon (10,042), and Howard Village (4,911). Cowles' Exhibit 2 admits that De Pere has specific problems that can be treated separately from those of Green Bay.

14. Even if it is assumed that Cowles has adequately sampled a cross-section of the community leaders of the Green Bay area, his showing violates the *Primer* in that (a) he has not properly listed the suggestions received, or (b) correctly set out the programming to meet the needs as evaluated. Regarding the suggestions received, the Commission's *Primer* states that "All ascertained community problems should be listed, whether or not he [the applicant] proposes to treat them through his broadcast matter." The findings show that Cowles has not listed all of his 44 ascertained community problems. Instead he submitted an exhibit which summarized the 44 community problems under 19 general topics. These general topics, i.e., "government," "education," "youth problems," etc., form no basis for determining what community problems exist in the service area. Cowles admits that he has not listed all of his ascertained community problems, but contends that he need not list all of his ascertained problems and that a summary is sufficient.

15. Similarly, the Commission's *Primer* states that "the applicant should give the description, and anticipated time segment, duration and frequency of broadcast of the program or program series, and the community problem or problems which are to be treated by it." The only public affairs discussion program Cowles proposes in this proceeding to meet his 44 ascertained problems is a daily one-half hour program called "Open Mike." But Cowles failed to specify the anticipated time segment called for by the Commission. He asserts, "We are not specifying now, and will not, and cannot realistically specify to the Commission, a period of 10:30 to 11:30 or whatever because, as a practical matter, it is going to be determined by what is being done in the way of broadcasting in the community at the time." Thus, on the question of "Open Mike's" time segment, Cowles asserts, "What time of day, we can't tell you. The time of day will be chosen and experimented with * * *" Cowles further insists that he "was under no obligation to come in with a written exhibit to give complete information about exactly what the programming format was going to be, and precisely how these programs were going to be used to meet the needs and interests determined by the applicant."

16. Upon the basis of the foregoing findings and conclusions, and the entire record in this case, it is ultimately concluded that Frank Cowles' application to construct and operate an AM station at Green Bay, Wisconsin, must be denied. Such denial is based upon his failure to show that he can adjust and maintain his proposed antenna system within the proposed limits of radiation. Even if Cowles had met his adjustment and maintenance issue, his application would still have to be denied for failing to meet the designated ascertainment of needs issue. The findings show (a) that Cowles has not interviewed an adequate cross-section of the community; (b) that he has not contacted a sufficient number of the community leaders in the Green Bay area; (c) that he has not adequately listed the suggestions received during the course of such interviews he did conduct; and (d) that he has not adequately set out the programming proposed to meet the needs as evaluated.

Accordingly, IT IS ORDERED that unless an appeal to the Commission is taken by any of the parties or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the application of Frank M. Cowles for a construction permit for a new standard broadcast station at Green Bay, Wisconsin, on 1080 kilocycles, 1 kilowatt, daytime only, employing a directional antenna, BE and the same IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
MILLARD F. FRENCH, *Hearing Examiner.*

F.C.C. 72R–270

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of DAILY TELEGRAPH PRINTING CO., [WBTW (TV)] FLORENCE, S.C. For Construction Permit To Change Facilities	Docket No. 18650 File No. BPCT–4162

MEMORANDUM OPINION AND ORDER

(Adopted September 27, 1972; Released September 28, 1972)

BY THE REVIEW BOARD: BERKEMEYER AND PINCOCK. BOARD MEMBER KESSLER DISSENTING FOR REASONS PREVIOUSLY STATED IN HER DISSENTING STATEMENT.

1. On August 4, 1972, Triangle Telecasters, Inc. (Triangle) filed a petition for reconsideration [1] in which it requests the Review Board to reconsider its Decision, 36 FCC 2d 4, 24 RR 2d 877, released July 5, 1972, and, upon reconsideration, to deny the application of Daily Telegraph Printing Company (Daily Telegraph).

2. This proceeding involves the application of Daily Telegraph, licensee of VHF television broadcast Station WBTW (TV), Florence, South Carolina, for authority to increase antenna height, move its transmitter site and make certain other technical changes. The application was designated for hearing under a UHF impact issue by Order, FCC 69–943, 19 FCC 2d 247, released September 2, 1969. The designation Order named Triangle Telecasters, Inc. (Triangle), licensee of UHF television broadcast Station WRDU, Durham, North Carolina, as a party respondent to the proceeding. On December 7, 1970, Administrative Law Judge Chester F. Naumowicz, Jr., released an Initial Decision, FCC 70D–52, in which he concluded that the application must be denied since a grant would impair the ability of UHF television broadcast Station WRDU to improve its operation by increasing its off-the-air market in the Fayetteville, North Carolina, area, and further augment its audience through the possible acquisition of a prospective satellite, Station WCCT, to be located in Fayetteville. In a Decision, released July 5, 1972 (36 FCC 2d 4, 24 RR 2d 877), the Review Board reversed the Presiding Judge's Initial Decision, concluding that a grant of Daily Telegraph's application "would, at most, occasion only minimal, if not highly conjectural, UHF impact."

[1] Also before the Board for consideration are: (a) opposition, filed August 21, 1972, by Daily Telegraph; and (b) reply, filed September 8, 1972, by Triangle.

3. It is well established that reconsideration will not be granted "merely for the purpose of again debating matters on which [the Commission or Board] has once deliberated and spoken." *WWIZ, Inc.*, 37 FCC 685, 686, 3 RR 2d 316, 317 (1964), affirmed *sub nom. Loraine Journal Company* v. *FCC*, 122 U.S. App. D.C. 127, 351 F. 2d 824, 5 RR 2d 2111 (1965), *cert. denied* 383 U.S. 967 (1966). Rather than alleging that the Review Board's Decision reflects either manifest error or material omission, petitioner urges adoption of aversion of the facts which the Board not only carefully considered but found unpersuasive. Triangle's argument that the Board erred in failing to consider the competitive impact of WBTW on WRDU throughout the entire overlap area (except for the communities of Raleigh and Durham) is a misstatement of the Board's Decision. To the contrary, the Board gave careful attention to this matter in paragraphs 21, 23 and 24 of its Decision, 36 FCC 2d at 13–14, 24 RR 2d at 890–891, with special reference to Cumberland County and Fayetteville proper. In this respect, Triangle has presented no argument which persuades us to depart from our prior determination. Likewise, the contention that the Board erred in evaluating competition only in terms of network programming, thereby excluding consideration of non-network programming, is not borne out upon careful reading of our Decision. The Board did find the facts that WRDU and the applicant will not be in network competition and that Fayetteville already receives a Grade A signal from an NBC affiliated station significant in determining that there was no real potential for WRDU to develop a substantial audience in Fayetteville. However, in paragraph 24 of our Decision, 36 FCC 2d at 14–15, 24 RR 2d at 890–891, the Board also discussed the extent of other programming presented by competing facilities both off-the-air and on cable, regardless of network affiliation. Triangle's third argument, that the Board disregarded Daily Telegraph's failure to show that the service benefits claimed from grant of its application could not be achieved from any other proposed site, must be rejected. The Board is aware of no case, and the petitioner cites none, where such a burden has been imposed on an applicant under a UHF impact issue. Rather, precedent clearly indicates that inquiry into alternate sites would not be appropriate here. See *WATR, Inc.*, 16 FCC 2d 844, 15 RR 2d 900 (1969). Despite Triangle's failure to urge any arguments that are basically new in support of its case, we have carefully re-examined the record in light of its arguments. Based on our re-evaluation of the record, we again conclude that grant of the application of Daily Telegraph Printing Company is warranted.

4. Accordingly, IT IS ORDERED, That the petition for reconsideration, filed August 4, 1972, by Triangle Telecasters, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
VICK GOULD, BELLEVUE, WASH.
Concerning Fairness Doctrine Re Station KING–TV, Seattle, Wash.

September 25, 1972.

MR. VICK GOULD.
Post Office Box 1576,
Bellevue, Wash.

DEAR MR. GOULD: This refers to your recent complaint concerning the operation of station KING–TV, Seattle, Washington.

By letter dated March 6, 1972, you stated that the licensee had failed to comply with the fairness doctrine in its treatment of the issue of taxation and tax reform in the State of Washington. In particular, you asserted that KING–TV presented a one hour news special on February 6, 1972 ("What Can We Do About Taxes?") which, in your opinion, advocated the passage of a proposed state income tax. You object to this programming in light of the licensee's subsequent refusal to afford comparable time to present views wholly opposed to the passage of any income tax legislation.

In response to a Commission inquiry, the licensee filed a reply to your complaint, dated April 18, 1972, together with exhibits, copies of which you have received. In its reply, the licensee stated that it has recognized the taxation issue as one of controversy and public importance and has "afforded a reasonable opportunity for the presentation of significant contrasting viewpoints on all sides." It also denied that the program "What Can We Do About Taxes?" advocated the passage of any general or particular plan of taxation but claimed instead that it merely presented for public discussion two specific tax reform proposals which were, in its judgment, the object of the greatest public interest and had the broadest base of public support.

By letter dated April 25, 1972, you stated that the gravamen of your complaint is the licensee's "failure to fairly present any opposition to an income tax at the same time the proponents were given one full hour."

In passing on your complaint, it is appropriate to set forth the principles which guide the Commission's resolution of problems regarding the fairness doctrine. First, as the Commission has often stated, the fairness doctrine requires only that the broadcaster afford a reasonable opportunity for presenting contrasting viewpoints on controversial issues of public importance in the station's *overall* programming. Thus, your complaint concerning the program "What Can We Do About Taxes?" must be considered in the context of the entirety of the licensee's broadcast coverage of the issue of tax reform in your state.

Second, no single viewpoint, nor any particular spokesman, is entitled to broadcast time. It is, instead, within the discretion of the licensee to choose the issues for discussion and the spokesmen for each issue. It must be emphasized that it is the right of the public to be informed which is paramount and which the fairness doctrine is designed to assure, rather than the right of any individual to broadcast his views. Finally, the Commission's determinations under the fairness doctrine are confined to the question of whether the licensee has acted reasonably and in good faith in its coverage of controversial issues of public importance. Absent specific allegations of fact indicating arbitrary or capricious handling of such issues, the Commission will not substitute its judgment for that of the licensee.

Applying these principles to the facts presented by your complaint and by the licensee's reply, it appears that there has been no violation of the fairness doctrine by KING–TV. The licensee has recognized the issue of tax reform in your state as one of controversy and public importance. Its reply states that the dual nature of the issue has also been recognized, i.e., whether the existing tax structure should be reformed and, if so, what shape such reform should take. Examination of the programming exhibits submitted by the licensee indicates that this issue has received substantial coverage in KING–TV's broadcasting and that the various contrasting viewpoints have been adequately presented. In particular, the side of the issue which you yourself advocate, namely, that all reform in the shape of an income tax should be rejected, has received coverage in no fewer than twelve regularly scheduled newscasts from January 11, 1972 to February 14, 1972. Moreover your particular views have been presented in at least three separate newscasts (January 11, 20 and February 14, 1972) (See Exhibits A, B and C). Thus, KING–TV appears to have presented contrasting viewpoints on the tax reform issue in its overall programming.

As to the program "What Can We Do About Taxes?", it was within the licensee's discretion to select from among the multiple views and spokesmen two proposals which had, in its judgment, attracted the greatest public interest and support and to afford an hour of broadcast time to the public discussion of such proposals.

In view of the station's coverage of viewpoints in opposition to income tax proposals both before and after the program in question, as well as references to such opposition in the program itself, it cannot be determined that KING–TV has failed to comply with the fairness doctrine in its overall handling of the issue of tax reform. Accordingly, no further Commission action is warranted.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulation, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

109–011—72——6

F.C.C. 72-863

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF J. B. MCNUTT, JR., TRADING AS THE HENDERSON COUNTY BROADCASTING CO., LICENSEE OF RADIO STATION KBUD, ATHENS, TEX.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted September 27, 1972; Released October 3, 1972)

BY THE COMMISSION:

1. The Commission has under consideration (1) its Notice of Apparent Liability dated August 18, 1971 (issued August 19, 1971), addressed to J. B. McNutt, Jr., tr/as The Henderson County Broadcasting Company, licensee of Radio Station KBUD, Athens, Texas, and (2) licensee's response to the Notice of Apparent Liability dated September 17, 1971.

2. The Notice of Apparent Liability in this proceeding was issued because of apparent willful or repeated violation of the terms of the station authorization [1] by commencing operation with power of 1,000 watts at 5:00 a.m. Central Standard Time (CST) from August 1, 1970 through October 24, 1970, except on Sundays, and by commencing operation at 6:00 a.m. CST with power of 1,000 watts from October 26 to October 31, 1970. The Notice indicated that the licensee was subject to apparent liability in the amount of two thousand dollars ($2,000) pursuant to Section 503(b) of the Communications Act of 1934, as amended, and that the proceeding was confined to violations occurring within one year prior to issuance of the Notice.

3. In response to the Notice of Apparent Liability, licensee asserts that the violations were not willful and states that they resulted from an erroneous conclusion as to commencement of operation when daylight saving time was in effect. Licensee states that early in 1968 the station was inspected and that the station logs revealed that during daylight saving time the station was operated at full power prior to the time authorized, but that the licensee was not cited for the violation. Licensee submits a copy of the operating log for October 28, 1967 showing operation at full power at 6:00 a.m. and logs for October 30 and 31, 1967, showing operation at full power at 7:00 a.m. Further, licensee states that he submitted the operating logs for May 31

[1] Station KBUD is licensed for daytime operation on 1410 kilohertz with a power of 1,000 watts, and has Presunrise Service Authority for 500 watts. Average sunrise times set forth in the license are 5:45 a.m. CST in August, 6:00 a.m. CST in September, and 6:30 a.m. CST in October.

and June 13, 1967, with his renewal application, and that these showed that the station commenced operation at full power at a time which licensee states he believed to be correct but which he now knows was incorrect, and that the station again was not cited and the license was renewed. Licensee contends that "on at least two occasions, Radio Station KBUD's pre-sunrise operation during Daylight Saving Time received an implied approval by this Commission's employees and/or staff." Licensee states that he did not try to conceal the operation and argues that with full disclosure having been made, he quite properly believed that the operation was in accordance with his license. Licensee states that if he had been notified of the violations in 1968 he would have promptly brought the station into compliance. In regard to the violations from October 26 to October 31, 1970, licensee denies the violations and submits copies of the operating logs for the days in question indicating that the station did not switch to full power until 6:30 CST. Licensee requests that the Notice of Apparent Liability be rescinded.

4. It appears from the circumstances in this case that except on Sundays the licensee commenced operation with full power prior to the time specified in the station license throughout the period August 1, 1970 through October 24, 1970, and we find the violations to be repeated during the period August 20, 1970 through October 24, 1970, for which a forfeiture is applicable. Since we have determined that the violations were repeated within the meaning of Section 503 of the Communications Act of 1934, as amended, we need not make a determination as to their willfulness. *Paul A. Stewart*, FCC 63–411, 25 RR 375. Licensees will not be excused for violations because they erroneously determined the time for commencement of operation [2] or because they were not cited for violations during a prior inspection. In regard to the logs submitted in support of the licensee's claim that the station was not cited for operating at full power when not authorized for such operation, it should be pointed out that prior to October 29, 1967 Station KBUD, pursuant to former Section 73.87, was permitted to operate with its daytime facilities between 4:00 a.m. and local sunrise unless notified by the Commission that such operation was not permitted. The log entries for October 30 and 31, 1967 showing full-power operation at 7:00 a.m. are in accordance with the station license which provides for operation at full power at 6:30 a.m. While we are not persuaded to rescind this Notice of Apparent Liability, in consideration of the fact that the logs indicate that the licensee did not commence operation in violation of the terms of the license on October 26 through 31, 1970, we conclude that the forfeiture should be proportionately reduced to $1,800.

5. In view of the foregoing, IT IS ORDERED, that J. B. McNutt, Jr., tr/as The Henderson County Broadcasting Company, licensee of Radio Station KBUD, Athens, Texas, FORFEIT to the United States the sum of one thousand eight hundred dollars ($1,800) for repeated failure to comply with the terms of the station authorization. Payment of the forfeiture may be made by mailing to the Commission a check

[2] Evergreen Broadcasting Corp., 26 FCC 2d 453 (1970).

or similar instrument drawn payable to the Order of the Treasurer of the United States. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days of the date of receipt of this Memorandum Opinion and Order.

6. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to J. B. McNutt, Jr., tr/as The Henderson County Broadcasting Company, licensee of Radio Station KBUD, Athens, Texas.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72R-271

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
PHIL D. JACKSON, EUREKA, CALIF.	Docket No. 19294 File No. BP-18196
W. H. HANSEN, EUREKA, CALIF.	Docket No. 19295 File No. BP-18455
CARROLL R. HAUSER, EUREKA, CALIF.	Docket No. 19296
For Construction Permits	File No. BP-18463

ORDER

(Adopted September 27, 1972; Released September 28, 1972)

BY THE REVIEW BOARD:

1. The Review Board having before it a petition to dismiss application with prejudice, filed August 17, 1972, by Phil D. Jackson (Jackson)[1] seeking dismissal of the application of W. H. Hansen (Hansen) pursuant to Section 1.276(f) of the Commission's Rules;[2]

2. IT APPEARING, That, in an Initial Decision, FCC 72D-40, released June 21, 1972, Administrative Law Judge Basil P. Cooper recommended a grant of the application of Carroll H. Hauser and a denial of the applications of Hansen and Jackson, and that Hansen did not file any exceptions to the Initial Decision within the specified time;[3]

3. IT IS ORDERED, That, the petition to dismiss application with prejudice, filed August 17, 1972, by Phil D. Jackson, IS GRANTED, and that the application of W. H. Hansen (BP-18455) IS DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[1] Also before the Review Board is the Broadcast Bureau's comments, filed August 30, 1972.

[2] Section 1.276(f) of the Commission's Rules reads as follows:
When any party fails to file exceptions within the specified time to an initial decision which proposes to deny its application, such party shall be deemed to have no interest in further prosecution of its application, and its application may be dismissed with prejudice for failure to prosecute.

[3] In response to Exceptions filed by the Broadcast Bureau, Hansen filed a reply brief in which he affirmatively states that "[d]espite the adverse conclusions reached by the Examiner, Hansen, for numerous reasons personal and otherwise, did not submit exceptions to the *Initial Decision.*" See Reply Brief in Opposition to Broadcast Bureau's Exceptions, filed July 31, 1972, p. 2.

F.C.C. 72R-284

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of JEFFERSON STANDARD BROADCASTING CO. (WBTV), CHARLOTTE, N.C. For Construction Permit	Docket No. 18880 File No. BPCT-4168

ORDER

(Adopted September 29, 1972; Released October 3, 1972)

BY THE REVIEW BOARD:

1. The Review Board having under consideration the petition for leave to amend to update application pursuant to Section 1.65 of the Rules filed on September 22, 1971, by Jefferson Standard Broadcasting Company;

2. IT APPEARING, That no objections to acceptance of the amendment have been filed within the time allowed therefor;

3. IT IS ORDERED, That the petition for leave to amend IS GRANTED and the amendment IS ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-862

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF LAKEWOOD BROADCASTING SERVICE, INC., LICENSEE OF STATION KLAK, LAKEWOOD, COLO.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted September 27, 1972; Released October 3, 1972)

BY THE COMMISSION: COMMISSIONER WILEY CONCURRING IN THE RESULT.

1. Now under consideration are: (a) our letter of April 26, 1972, notifying Lakewood Broadcasting Service, Inc. (KLAK), licensee of Station KLAK, Lakewood, Colorado, of its apparent liability for a forfeiture of $2,000; (b) Lakewood's responses to that letter, dated May 30 and 31, 1972; and (3) an opposition to KLAK's responses filed June 23, 1972, by Mission Denver Co. (Mission), proposed [1] licensee of Station KBTR, Denver, Colorado.

2. Mission monitored and taped the broadcasts of Station KLAK during the week of October 17-23, 1971. Believing that it had found violations of certain of our Rules and policies, it filed a pleading pursuant to Section 1.41 that brought these matters to our attention and requested that we take appropriate action. Based on those pleadings, and KLAK's response, we issued the Notice of Apparent Liability of April 26, 1972, for violations of Sections 73.1201(b) (1) and (3) of our Rules. Section 73.1201(b)(1) provides:

> Official station identification shall consist of the station's call letters *immediately* followed by the name of the community or communities specified in its license as the station's location. (Emphasis supplied.)

Section 73.1201(b)(3) provides in part:

> A licensee shall not in any identification announcements, promotional announcements or any other broadcast matter either lead or attempt to lead the station's audience to believe that the station has been authorized to identify officially with cities other than those permitted to be included in official station identifications * * *.

3. Lakewood is adjacent to Denver, Colorado. Station KLAK is licensed to Lakewood and has a primary obligation to serve that city.[2] The station identification requirements embodied in Section 73.1201 of our Rules, and in *Broadcast Station Identification Requirements*,

[1] The Commission granted the application (BAL-7409) assigning the license of Station KBTR to Mission on July 26, 1972. Lakewood, however, has appealed that action. On August 2, 1972, we issued a temporary stay of the grant.

[2] Lakewood has a population of 92,787, while that of Denver is 514,678 (1970 Census). The only stations licensed to Lakewood are KLAK and commonly owned sister station KJAE(FM). There are 21 aural and five television broadcast stations licensed to Denver.

10 FCC 2d 407 (1967), are among the several means we have adopted to assure that licensees discharge their primary obligation. In our view the identification of a station with a particular city aids its residents in judging the station's responsiveness to the city's problems and draws attention to the station as an outlet for local self expression, and public service programming and announcements. For the reasons set out below, we believe that the announcements and other matter broadcast by Station KLAK tend to defeat our objectives in this area and violate Sections 73.1201(b) (1) and (3).

4. Radio station identification announcements are mandatory on the hour and half hour, see Section 73.1201(a). KLAK taped and used six forms of station identification for the mandatory announcements. Of these, three were in the following form: "You've dialed right, KLAK serving greater Denver from Lakewood, presenting the —— Show"; "This is KLAK serving greater Denver from Lakewood"; and "This is KLAK serving greater Denver from Lakewood, presenting the —— Show". These announcements constituted slightly more than 50 percent of the required identification announcements during the monitored week. The city of license does not immediately succeed the call letters and therefore violates Section 73.1201(b)(1).

5. KLAK asserts that it was unaware of the precise wording of Section 73.1201(b)(1) and that the violation was "only technical." KLAK also states that the violation was immediately corrected and that the incorrect forms of identification were adopted in a good faith, albeit erroneous, effort to comply with Commission policy. In these circumstances, KLAK contends that the imposition of a forfeiture is unfair and that the amount, $2,000, is excessive.

6. KLAK concedes that it violated the rule and that the violations were repeated. We are not impressed by the contentions that they were "only technical" and were based on lack of knowledge of our Rules. In a sense, many substantial Rule violations might be termed "technical"; e.g., failure properly to log a program or an announcement, failure properly to make certain technical entries in the operating log. Terming a violation "only technical," however that phrase may be defined, does not remove liability for the violation. Moreover, we expect licensees to know and conform their conduct to the requirements of our Rules. If ignorance of their provisions were accepted as an excuse, we would be encouraging licensees to know as little as possible. When violations are found, licensees are expected to correct them. Such corrections are not a basis for mitigating or remitting a forfeiture, *Executive Broadcasting Corporation*, 3 FCC 2d 699 (1966). We find no basis, therefore, for reducing or remitting the forfeiture on the grounds put forth by KLAK concerning Section 73.1201(b)(1).

7. KLAK urges that in these and other announcements it did not lead or attempt to lead its listeners as to the station's licensed location in contravention of Section 73.1201(b)(3). KLAK contends that since there has been no showing that any of its listeners have been misled, it must be shown that it attempted to mislead the audience. KLAK further contends that in order to demonstrate an attempt to mislead an intent to do so on its part must be shown, and that no showing of intent can be made for various reasons.

8. We disagree with KLAK as to the standard by which its conduct is to be judged. We do not believe that it is necessary for us to identify persons that were actually misled by KLAK's announcements. Our role in this area is somewhat analogous to that of the FTC in the area of false and misleading advertising. "Actual deception, proved by deceived consumers, is not necessary: the likelihood or capacity to deceive is the criterion by which advertising is to be judged," *Montgomery Ward & Co.* v. *FTC*, 379 2d 666, 670 (7th Cir. 1967). We, too, believe that proof of actual deception of listeners as to a station's licensed location is not necessary, but that the likelihood or capacity to mislead is the standard [3] by which we should judge a station's announcements or other broadcast matter as to their compliance with Section 73.1201(b)(3). Thus, in *Broadcast Station Identification Requirements*, cited above in paragraph 3, we gave examples of announcements or practices that violate the rule. We reached that conclusion based on our judgment that the announcements or practices has the capacity to mislead. We had not conducted a study to determine how listeners would actually perceive the particular examples. Nor do we believe that such a study need be made in individual cases such as the one now before us. It should be noted that KLAK's announcements were not in the form given as acceptable in the examples in *Broadcast Station Identification Requirements*, above, and that some of its other broadcast matter is very close to examples of improper practices.

9. We wish to emphasize that the violation of Section 73.1201(b)(3) was based on viewing several factors together. Thus, while we shall discuss KLAK's arguments as to each of those factors separately, the overall effect of all factors should be kept in mind, not just the effect of the particular factor considered by itself.

10. KLAK urges that the improper identification announcements did not mislead listeners as to its licensed location. In its view, the announcement, "This is KLAK serving greater Denver from Lakewood," emphasizes its relationship to its city of license. We do not argue that some people may understand such an announcement to be that of a station licensed to Lakewood. We conclude, however, that this announcement has the capacity or is likely to mislead listeners to believe that Station KLAK is a Denver or Denver area station that happens to have its transmitter and/or studios in Lakewood. KLAK also argues that the phonetic and visual identification of its call letters point out the station's connection with Lakewood and that this factor negates the possibility that its announcements are misleading. When dealing with aural announcements, visual factors must be substantially discounted. As noted in the Notice of Apparent Liability, we also discount any phonetic tie to the city of license in the minds of listeners because the call letters are read individually, not as

[3] When considering the capacity or likelihood to deceive, it should be noted that the FTC's function is "to protect the casual, one might even say the negligent, reader, as well as the vigilant and more intelligent and discerning public." *Parker Pen Co.* v. *FTC*, 159 F. 2d 509, 511 (7th Cir. 1946). Similarly, when considering the likelihood or capacity of certain broadcast matter to mislead listeners as to a station's city of license, we have not adopted a standard designed to assure that only the "vigilant and more intelligent and discerning public" would be aware of a station's licensed location. Rather, we have adopted a standard designed to assure that most listeners will know the station's city of license.

a word and because the station frequently uses the phrase "klock radio" in over-the-air promotional announcements. This phrase was broadcast more than 65 times on one day during the monitored week. Thus, we conclude that the improper announcements are a factor that tends to mislead the station's audience as to the station's licensed location, and that phonetic or visual considerations do not change that conclusion.

11. KLAK broadcast more than 700 time and weather announcements during the monitored week. These often referred to "Metro Denver", "Greater Denver", or "the Denver area"; for example, "Greater Denver weather * * * currently at our studio is 48, Denver's official temperature is now 56 degrees." The fact that KLAK's studios are in Lakewood was mentioned in only three of the 700 announcements. Moreover, on more than 200 occasions, time and/or weather announcements were tied solely to Denver, not the Denver metropolitan area. Examples of such statements include: "It's 46 degrees in mile-high Denver"; "33 Denver degrees"; "It's 12:15 in mile-high Big 'D' "; "26 away from five o'clock on a Tuesday afternoon, a beautiful day in Denver"; and "Got a Denver temperature now of 47".

12. In the circumstances presented here, we believe that the more than 200 time and weather announcements tied solely to Denver constitute statements that are inconsistent with Station KLAK's assignment to Lakewood, see example 6 of *Broadcast Station Identification Requirements*, above, and are misleading. Of course it is permissible to broadcast time and/or weather announcements related to cities other than the city of license. What we have here, however, are time and weather announcements that emphasize Denver coupled with an almost total absence of similar announcements giving any reference to the city of license.

13. In the Notice of Apparent Liability, we noted that in commercials in which listeners were asked to write to the station to purchase certain merchandise, the station's address was given as Denver. The studio is in a postal zone that includes part of Denver and Lakewood. The station therefore has an option of using either Denver or Lakewood as its address. At the time the Notice was issued, we had on file a letter from the Denver Postmaster stating that mail addressed to the station using the Lakewood address would be delivered without delay. The Postmaster has since submitted a second letter stating that where the zip code is omitted some delay may be encountered if the Lakewood address is used, and to "avoid the possibility of delay, we recommend that customers use the Denver, Colorado 80227 address as preferable." We agree with Lakewood that this second letter tends to negate the inference that it used the Denver address for the purpose of misleading its listeners. We can not fault KLAK for using an address that the Postmaster has recommended patrons in the area to use. Nonetheless, we believe that the factors discussed previously are sufficient to sustain our finding that Section 73.1201(b)(3) was violated.

14. In view of the above, we are not persuaded to mitigate or remit the forfeiture.

15. Accordingly, IT IS ORDERED, That Lakewood Broadcasting Service, Inc., licensee of Station KLAK, Lakewood, Colorado, FORFEIT to the United States the sum of two thousand dollars ($2,000) for repeated violations of Sections 73.1201(b)(1) and 73.1201(b)(3) of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days of the date of receipt of this Memorandum Opinion and Order.

16. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to Lakewood Broadcasting Service, Inc.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-694

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of THE BOARD OF TRUSTEES OF THE LELAND STANFORD JUNIOR UNIVERSITY (KZSU), STANFORD, CALIF. Has: 90.1 MHz, No. 211; 10 watts Requests: 90.1 MHz, No. 211; 3 kW; —13 feet For Construction Permit	)

MEMORANDUM OPINION AND ORDER

(Adopted July 26, 1972; Released August 1, 1972)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT. COMMISSIONER HOOKS NOT PARTICIPATING.

1. The Commission has before it for consideration the above-captioned and described application for a construction permit for an existing noncommercial educational FM broadcast station for an increase in facilities and a request for waiver of section 1.573 of the Commission's rules for acceptance of the application.

2. Based upon the method specified in the Commission's rules, the proposed operation of KZSU will be involved in mutual interference within 1 mv/m contours with station KCMA, San Francisco; the proposed operation will receive interference within its proposed 1 mv/m contour from station KFJC, Los Altos; there will be mutual interference within 1 mv/m contours with the station proposed by the Saint Francis High School in Mountain View; and interference will be caused within the 1 mv/m contour of a station proposed by the Corporation for Community Radio in Richmond. Section 1.573 of the Commission's rules does not permit acceptance or grant of an application which either causes or receives interference within 1 mv/m contours.

3. In support of a waiver of section 1.573, the applicant states that the interference to be caused within the 1 mv/m contour of KCMA, roughly 23.4 square miles, is felt not to be significant enough to jeopardize the application as this interference occurs over the waters of San Francisco Bay and, in addition, the San Bruno Mountains which lie between KZSU and KCMA serve to isolate the two stations from each other so that the possibility of actual interference is negligible. Insofar as the interference to be received from KFJC is concerned, the applicant states that it is felt that the benefits gained with the increase in KZSU's service will vastly outweigh the problems of KFJC's interference with the KZSU signal. Mutual exclusivity with the Mountain View proposal is recognized and it is stated that the KZSU proposed operation would interfere with almost 8 percent of the area within

the Mountain View 1 mv/m contour. Nothing is mentioned concerning the proposed station in Richmond.

4. It appears that in determining that interference will only be received from KCMA, an assumption was made that the antenna height above average terrain of KCMA was the same in all directions (105 feet), whereas the antenna heights above average terrain on the 90- and 135-degree radials which are pertinent in this case, are respectively 207 and 265 feet. By use of these heights it is found that mutual 1 mv/m interference would result with KCMA. While most of the interference area lies in San Francisco Bay and is not considered objectionable, some lies on land. Other than mention of the San Bruno Mountains, no showing is made as to how these would restrict the signals of KCMA. The interference to be received from KFJC, operating on the second adjacent channel, will be a small area around the KFJC transmitter site where the KFJC signal will be substituted for the KZSU signal. The matter of interference with the Mountain View and Richmond proposals would normally be considered in a hearing, should the applications be accepted.

5. No showing is made as to the need for the substantial increase in facilities from 10 watts to 3 kilowatts. A modest increase in facilities or the use of a directional antenna system could eliminate the interference with KCMA, to the proposed Mountain View operation, and to the Richmond proposal. Such an operation may still receive some interference within the 1 mv/m contour from KFJC and the proposed Mountain View operation; however, these interference areas would be quite small around the KFJC and Mountain View transmitter sites and may possibly be considered *de minimis*.

6. It does not appear that the applicant has advanced any reasons which are sufficiently compelling to warrant a waiver of section 1.573 of the rules for the interference and acceptance of the application. Waiver could only be justified on the basis of a compelling showing. This the applicant has failed to provide. Since it has failed to provide a showing sufficient, if true, to warrant waiver, a hearing on the request is not required.[1]

7. Accordingly, IT IS ORDERED, That the request of The Board of Trustees of the Leland Stanford Junior University for waiver of section 1.573 of the Commission's rules IS DENIED, and that the above-captioned application BE RETURNED to the applicant.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[1] *U.S.* v. *Storer Broadcasting Co.*, 351 U.S. 192, 13 RR 2161 (1956).

F.C.C. 72-809

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PARTS 1, 2, 21, AND 43 OF THE COMMISSION'S RULES AND REGULATIONS TO PROVIDE FOR LICENSING AND REGULATION OF COMMON CARRIER RADIO STATIONS IN THE MULTIPOINT DISTRIBUTION SERVICE	Docket No. 19493

MEMORANDUM OPINION AND ORDER

(Adopted September 13, 1972; Released October 3, 1972)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND REID ABSENT; COMMISSIONER JOHNSON DISSENTING; COMMISSIONER H. REX LEE CONCURRING IN THE RESULT; COMMISSIONER WILEY CONCURRING AND ISSUING A STATEMENT; COMMISSIONER HOOKS DISSENTING AND ISSUING A STATEMENT.

1. The Commission has before it a "Petition for Modification of Procedures" filed with respect to this proceeding by the law firm of McKenna, Wilkinson and Kittner (Petitioner) on May 19, 1972. An opposition to the petition was filed on behalf of Microband Corporation of America, Dayton Communications Corporation, and Chicago Communication Service, Inc. (Applicants)[1] on May 31, 1972. A reply was filed by Petitioner on June 19, 1972. In addition, the Multipoint Microwave Common Carrier Association (Association) filed an informal objection to the petition on June 7, 1972.

2. On April 26, 1972, the Commission released a Notice of Proposed Rule Making in this proceeding (34 FCC 2d 719) which proposed the establishment of rules which would constitute a new common carrier omnidirectional microwave service, to be called the Multipoint Distribution Service. Since a number of applications had already been filed under the existing 2150–2160 MHz omnidirectional frequency allocation in the Point-to-Point Microwave Radio Service, we stated, among other things, that those applications which are consistent with the proposed rules and not mutually exclusive would be processed and acted upon. Petitioner objects to this policy and requests:

(a) That no application be processed prior to finalization of the proposed rules;

(b) That the Commission permit applications that would be mutually exclusive with existing applications to be filed for a period of 60 days from the adoption date of the new rules; and

(c) Clarification of paragraph 6 of the Notice to specify that all persons will be permitted to file for the proposed second television channel.

[1] All have pending omnidirectional applications on file.

3. In support of these requests Petitioner contends that the interim procedures when considered in conjunction with the cut-off rules (Sections 1.227(b)(3) and 21.30(b)) are unfair to prospective applicants and will have the effect of depriving the public of a truly meaningful choice among applicants. Moreover, Petitioner states that although the rule change that permitted the "new" use (i.e. video) of the 2150–2160 MHz band occurred in July of 1970, the first such application was not filed until February, 1971 and the trade press did not begin to carry accounts of this medium until the Summer and Fall of 1971 at which time it was reported that the Commission would lay down new ground rules for the service. It, therefore, argues that potential applicants should not be penalized because of their desire to file a complete and acceptable application initially. Petitioner contends that this would not violate the ostensible purpose in adopting the cut-off rule which was to deal with the continual problem of processing and reprocessing applications and the inordinate resultant time lapse.

4. In opposition, Applicants contend that the petition is procedurally defective, that no standing to file the petition has been demonstrated, that a stay would delay inauguration of a needed service in the public interest, and that waiver of the cut-off rules would significantly add to the existing common carrier backlog of applications and result in a procedural nightmare for the Commission. The Association makes several of the same points and additionally notes that the Commission, over a 15 month period, has given more than 50 notices of applications filed and that it is difficult to imagine anyone more out of time than Petitioner's faceless parties.

5. We believe the public interest questions raised are sufficient to warrant resolution. Therefore, we will respond on the merits without further consideration of the procedural arguments.

6. First, we see no justification for not processing and acting on those applications that are consistent with the proposed rules and not mutually exclusive. The 2150–2160 MHz omnidirectional frequency allocation is not new. It was established for use in 1962 (27 FR 12372) and little or no interest was shown in it until 1970 when Varian Associates petitioned the Commission to remove a 3.5 MHz bandwidth limitation which had been inadvertantly applied to the band in a subsequent rule making involving other 2 GHz point to point bands. The decision to promulgate new rules for omnidirectional microwave was not made for the purpose of establishing a new type of service but in response to the large number of applications filed in an existing service. The new rules are intended essentially to insure, in view of the apparent demand, that the limited band is efficiently used.[2] Moreover, any applications that are granted in this interim period will be made subject to the final outcome of the rule making proceeding.

7. For largely the same reason we see no justification in waiving the cut-off rules. Those persons that became acquainted with the Commission's rules and applied for available frequencies should not be disadvantaged and unnecessarily delayed because others became

[2] Where the proposed rules involve the use of frequencies not now allocated for omnidirectional use, we said we would not accept applications proposing such new frequency use prior to finalization of the rules.

knowledgeable much later and only after substantial publicity. Nor do we believe the public would benefit by the waiver since the institution of service would likely be delayed for up to several years in most cities.[3]

8. Concerning the second proposed 6 MHz channel, we stated at paragraph 6 of the Notice that we would not initially authorize a single user more than one 6 MHz channel in a given area, but that once such a carrier has operational experience and can show a definite need for additional facilities, an application for a second channel can be made. This statement was made with the presumption that the second channel was still available. There was no intention of reserving this channel for an existing carrier. The second 6 MHz channel, when it becomes available, would be available for use by any qualified applicant, except for the above mentioned limitation applicable to the user of the first channel.

9. In view of the foregoing, IT IS HEREBY ORDERED THAT the Petition for Modification of Procedures filed by McKenna, Wilkinson and Kittner IS HEREBY DENIED except as otherwise indicated above.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

CONCURRING STATEMENT OF COMMISSIONER RICHARD E. WILEY

I concur in the Commission's affirmative action on these applications in order to avoid unnecessary delay in the implementation of what promises to be an innovative service in the public interest. Nevertheless, I am constrained to reiterate that our Notice of Proposed Rule Making in this proceeding raised a serious question as to whether anti-siphoning rules, similar to those adopted in our Report and Order in Docket No. 18893, would be appropriate. Any applications that may be granted before the completion of our Rule Making are expressly conditioned on the outcome of that proceeding (see para. 6). Consequently, our action today in no way depreciates our commitment to explore fully our anti-siphoning policy and to extend its application wherever appropriate.

DISSENTING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS

In this matter, I would have granted Petitioner's request not to process applications on file prior to an orderly culmination of the Rule Making Procedure for a new television service, Multipoint Microwave Distribution.

While I can perceive valid equities on the part of those prescient applicants who filed—in complete compliance with our existing Point-to-Point Rules (47 CFR Part 21)—before the Commission publicly announced the initiation of MDS in its April 26, 1972, Notice of Pro-

[3] As the matter currently stands of about 150 cities applied for, approximately one half involve mutually exclusive applications. If the cut-off rule were waived it is likely that virtually all would become mutually exclusive, thus requiring extensive comparative proceedings.

posed Rule Making,[1] I believe there to be an transcendent public interest argument for permitting all interested parties to have an opportuntiy to compete for a license; particularly since there may be only one channel (2150–2160 MHz) assigned to a city and most of the choice cities have been captured before the service is even established.

Moreover, even if the 60-day cutoff insultated applications filed under now existing Point-to-Point Rules, the alterations necessary to bring such applications into conformity with proposed MDS strictures cannot but be considered "major" modifications, against which applications mutually exclusive proposals can be filed. See § 21.23(c) of the Commission's Rules describing a "major" modifications and § 21.30(b) which declares that an application so modified will "be considered a newly filed application."

[1] FCC 72–360 released April 26, 1972.

109–011—72——7

F.C.C. 72-843

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application by CECIL L. AND JOYCE HEFTEL, HONOLULU, HAWAII For Transfer of Control of Pacific Broadcasting Co., Inc., Stations KGMB-AM-FM-TV, Honolulu and KPUA-AM-TV, Hilo, Hawaii from Standard Corp. to Cecil L. Heftel and Joyce Heftel	BTC-6809

SEPTEMBER 20, 1972.

MR. CECIL L. HEFTEL,
Post Office Box 581
Honolulu, Hawaii 96809

DEAR MR. HEFTEL: This is with reference to the application for consent to the transfer of control of Pacific Broadcasting Company, Inc., licensee of Stations KGMB AM-FM-TV, Honolulu and KPUA AM-TV, Hilo, Hawaii, from the Standard Corporation to yourself and your wife, Joyce Heftel, as individuals and as Trustees of various family trusts (BTC-6809).

Sections 73.35, 73.240 and 73.636 generally proscribe the acquisitions of broadcasting stations where such an acquisition will result in the common ownership or control of both aural and television facilities in the same market. You have requested a waiver of these rules to permit your acquisition of these aural-TV combinations in Honolulu and Hilo, and in the alternative, you have stated your willingness to accept a grant subject to divestiture within one year of either the aural or TV facilities in these markets.

We note that the transaction here is an internal and intrafamily restructuring of ownership interests in stations which have been controlled by the A. L. Glassman family since 1965. We also note that transferees here, the daughter and son-in-law of A. L. Glassman (deceased) are substantial stockholders in both Pacific Broadcasting Company, Inc., the licensee corporation (20%), and its parent, The Standard Corporation (25%), and that Mr. Heftel has, since 1965, served as President and Director of the licensee corporation and as an officer and director of the parent corporation, and that the qualifications of the Heftels were passed upon by the Commission when the Glassman family acquired control of these stations in 1965. In view of these facts, the Heftels could acquire positive control of the licensee of these stations through the acquisition of less than a 50% interest on a Form 316 "pro-forma" application for transfer of control and the

"one-to-a-market" provisions of our multiple ownership rules would not apply to such an application. In these circumstances we have decided that a waiver of the multiple ownership rules is justified.

Accordingly we have this day waived the "one-to-a-market" provisions of our multiple ownership rules and granted your application for transfer of control of Pacific Broadcasting Company, Inc. subject to a later determination of the grant fee.

Commissioner Robert E. Lee absent; Commissioner Johnson dissenting; Commissioner H. Rex Lee dissenting and issuing a statement.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

Dissenting Statement of Commissioner H. Rex Lee

I must dissent to the majority's action in approving the application for transfer of control of Pacific Broadcasting Company, Inc., licensee of Stations KGMB–AM–FM–TV, Honolulu, and KPUA–AM–TV Hilo, Hawaii. The Standard Corporation now owns 80% of the stock of Pacific[1] and Cecil and Joyce Heftel (husband and wife) each holds a 10% interest in the licensee. Standard, in turn, is owned by the Glasman family (75%) and by the Heftels (25%).[2] In effect, the Heftels' total interest in Pacific, through direct stock ownership and their ownership of Standard stock, amounts to 40%. The Heftels now seek to acquire a 100% ownership interest in the licensee corporation through the exchange of their stock in Standard for all of Standard's stock in Pacific. The Heftels request waiver of the Commission's multiple ownership rules, which proscribe any acquisition that results in the common ownership or control of both aural and television facilities in the market. Alternatively, the transferees indicate their willingness to accept grant of their application subject to divestiture within one year of either the aural or television facilities (and upon the assumption that tax certificates would be issued by the Commission after divestiture).

The majority's rationale for waiver of the multiple ownership rules and grant of the transfer application is based on the following considerations: (1) the Heftels are already substantial stockholders in Pacific and its parent (and Cecil Heftel has served as an officer and director of the licensee and parent corporations since 1965); (2) the qualifications of the Heftels were passed upon by the Commission when the Glasman family acquired control of the Hawaii stations in 1965; and (3) the Heftels could have acquired positive control of Pacific through the acquisition of less than a 50% stock interest on the basis of an FCC Form 316 (Short Form) application to which the multiple ownership restrictions are inapplicable. I simply cannot agree with such an ill-considered action. First, as I have previously

[1] Standard also owns 80% of the licensee of television Station KUTV, Salt Lake City, Utah, and 15% of Tele-Communications, Inc., a publicly-held corporation which owns a Denver cable system, a film syndication business and a common carrier microwave business. Standard, in addition, owns and operates the *Ogden Standard Examiner,* a daily newspaper in Ogden, Utah.

[2] Cecil and Joyce Heftel, the transferees here, are the son-in-law and daughter of A. L. Glasman (deceased).

noted,[3] our revised multiple ownership rules do apply to applications for assignment of license and transfer of control of existing stations, and only involuntary or *pro forma* assignments and transfers (as defined in Sections 1.540(b) and 1.541(b) of the rules) are exempted from the duopoly provisions of the multiple ownership rules. Since the transfer here is voluntary and the interest to be transferred is a controlling one (60%), whereby the Heftels will gain total ownership of the licensee, our multiple ownership rules are applicable and the parties to the transaction were correct in filing their transfer request on FCC Form 315.

While it may be true that the Heftels have enjoyed a substantial interest in the corporate licensee in the past, the fact remains that their acquisition of the remaining stock of Pacific will give them positive and complete control over the policies and programming of the Honolulu and Hilo stations—a power which they apparently have not possessed in the past. Therefore, it cannot be seriously argued that the goals of our expanded duopoly rules, *i.e.*, to promote competition and to increase the diversification of program and service viewpoints, are promoted by the concentration of control of the licensee in the hands of the Heftels. While the decision is not an easy one to make in light of the Heftels' existing 40% interest, their relationship with the Glasman family and our prior assessment of their qualifications, I do not believe that their present stock ownership should, in effect, be treated as a majority interest in the absence of a showing of their actual control of Pacific or that we should avoid our carefully-conceived plan to bring new competition and viewpoints to broadcasting.

Moreover, I am most concerned by the majority's position that since the Heftels could have acquired positive control of Pacific through the transfer of less than a 50% interest in the licensee and the filing of an FCC Form 316, the Commission need not be troubled by the multiple ownership ramifications of the proposed transfer. The position is apparently based on some unfortunate language in *Clay Broadcasters, Inc.*, FCC 71–264, 21 RR 2d 442.[4] Contrary to the interpretation in that case, it seems clear to me that whenever a minority shareholder in a corporate licensee seeks to acquire enough stock to give him affirmative or negative control, prior Commission approval should be obtained, consistent with the mandate of Section 310(b) of the Communications Act. However, even if the *Clay Broadcasters* holding is correct, it does not apply to the present situation where a 60% interest is passing and where the applicants have sought prior Commision approval of the transfer and waiver of the multiple ownership rules. We must not avoid our responsibility to enforce statutory and administrative requirements merely because of an unwise interpretation about the proper form to be used to report a stock

[3] See my dissenting statement in regard to the application for transfer of control of Mount Hood Radio & Television Broadcasting Corporation, licensee of Stations KOIN–AM–FM–TV, Portland, Oregon, Public Notice of October 1, 1971 (Report No. 10163).

[4] In *Clay Broadcasters*, the Commission purported to affirm a "long-standing administrative interpretation" to the effect that the transfer of less than a 50% interest to existing minority stockholders, whose qualifications had been previously passed on, can be reported on a short form (FCC Form 316) application.

transfer. What form should be used cannot be the controlling question in any event [5]— the issue to be addressed here is whether the proposed transfer is consistent with our diversification policies. Our approach in situations like the present one should be in favor of the broad application of such policies rather than the creation of an additional exemption that subverts the very purpose of our regulations and invites serious abuse of our processes.

Since I am unable to find other compelling public interest considerations which would outweigh the importance of diversifying the ownership and control of broadcast facilities, I can only conclude that our multiple ownership rules prohibit this transfer, which would concentrate the control of aural-television combinations in Hawaii in the hands of the Heftels. As a result, I would either deny the transfer application or approve a grant subject to the transferees' divestiture of either the aural or television facilities. I would not, however, indicate that the tax certificates, pursuant to Section 1071 of the Internal Revenue Code, would issue from the Commission after divestiture. As I've pointed out in another context,[6] where the increased ownership in broadcast facilities is permitted only to facilitate the disposition of the transferor's interest, the transferee should not be accorded a tax advantage and should not be permitted to profit from a required divestiture.

For all of these reasons, I must respectfully dissent to an action that effectively ignores the diversification goals of our multiple ownership rules and encourages the evasion of statutory and administrative requirements relating to the transfer of control of broadcast licensees.

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[5] In this regard, it is interesting to note that, in the general instructions contained in FCC Form 316, the Commission specifically reserves the right to require the refiling of an assignment or transfer application on Forms 314 or 315 if appropriate.

[6] See my statement in regard to the assignment of licenses of Stations WSLS–AM and FM, Roanoke, Virginia, from Roy H. Park Broadcasting of Roanoke, Inc., to Bass Brothers Telecasters, Inc., Public Notice of June 23, 1972 (Report No. 10744).

F.C.C. 72R-281

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
RESORT BROADCASTING CO., INC., LEISURE CITY, FLA.	Docket No. 18956 File No. BPH-6545
FINE ARTS BROADCASTING CO., GOULDS, FLA.	Docket No. 18958 File No. BPH-6617

For Construction Permits

ORDER

(Adopted September 29, 1972; Released October 3, 1972)

BY THE REVIEW BOARD:

1. The Review Board having under consideration the petition for leave to amend to update application, filed January 14, 1972, by Resort Broadcasting Co., Inc.;

2. IT APPEARING, That no objections to the acceptance of the amendment have been filed within the time allowed therefor;

3. IT IS ORDERED, That the petition for leave to amend IS GRANTED and the amendment IS ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-861

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.606(b), TABLE OF ASSIGNMENTS, TELEVISION BROADCAST STATIONS (TERRE HAUTE, IND.)	Docket No. 19536 RM-1919

REPORT AND ORDER

(Adopted September 27, 1972; Released October 2, 1972)

BY THE COMMISSION:

1. The Commission here considers the Notice of Proposed Rule Making in this proceeding, adopted July 6, 1972 (FCC 72-598; 37 F.R. 14002). This was based on the petition of Alpha Broadcasting Corporation (Alpha), to amend the Television Table of Assignments (Section 73.606(b) of the Commission's Rules) to assign Channel 38 in lieu of Channel 66 at Terre Haute, Indiana (RM-1919). Changes elsewhere are not necessary in order to make the assignment. Alpha, as the holder of a construction permit (BPCT-4117), also requested a show cause order from modification of a construction permit should the Commission grant the substitution.

2. Pertinent information about Terre Haute is as follows: its population is 70,335; it is the seat of Vigo County, population 114,528, and it is the central city of the Terre Haute Standard Metropolitan Statistical Area (SMSA) consisting of Vigo, Clay (population 23,933), Sullivan (population 19,889), and Vermillion (population 16,793) Counties.[1] Channels 2, 10, *26, and 66 are presently assigned to Terre Haute and Stations KTWO and KTHI-TV operate on Channels 2 and 10, respectively.

3. Petitioner's premise is that in order for a commercial UHF station to compete with VHF stations, there must be a reduction of the disparity between that of VHF and UHF channels, here, narrowing the difference in frequencies. Alpha referred to its prior petition to change the educational reservation from Channel 26 to 66 which was denied; 19 RR 2d 1859 (1970). In this proceeding, Alpha seeks the lowest UHF channel available in light of the action taken in the land mobile proceedings.[2] More specifically, Alpha noted that in Docket No. 18262 steps have been taken to reassign Channels 70 through 83 to the land mobile services, and Alpha believes that in a few years this may be extended downward to encompass Channel 66. Alpha amended its proposal which originally called for the interchange of

[1] All population figures are taken from the 1970 Census.
[2] See First Report and Order, Docket No. 18261, 23 FCC 2d 325 (1970); and First Report and Order and Second Notice of Inquiry, Docket No. 18262, 19 RR 2d 1663 (1970).

the noncommercial reservation from Channel 26 to Channel 38, but the Corporation for Public Broadcasting (CPB), and the National Association of Educational Broadcasters (NAEB) opposed that proposal; Alpha amended its petition to merely request substitution of Channel 38 for 66. The amended proposal was noticed for rule making.

4. The only party commenting in this proceeding is the petitioner, which for the most part, relies on the arguments previously made. These are summarized above. Alpha indicates that time is of the essence, since the target date for Station WIIL–TV to commence operation is October 29, 1972, as an affiliate of the American Broadcasting Company (ABC); since ABC has a secondary affiliation with both Stations WIWO and WTHI–TV, Alpha is desirous of an orderly realignment of programming for all three stations. Alpha also urges that, because of its scheduled date for commencing operation, sufficient amount of time to engage in the usual procedure for show cause is not available, that is, substitution of channels, issuing a show cause order, and a formal order that Alpha may change facilities. Alpha states that orders for some of the required equipment had been placed and firm orders for the remainder will be delayed pending completion of the rule making. Alpha states that there is "no doubt" that it may waive issuance of a show cause order, since modification of the CP would be mandatory once a change is made in the Table of Assignments and all interested parties have had ample opportunity to comment on the proposal. It is asserted that the public not only will not be adversely affected by the waiver of the show cause order, but, indeed, the public interest, convenience and necessity would be served.

5. While we find that the public interest, convenience, and necessity would be served by the substitution of Channel 38 for 66 at Terre Haute, Indiana, Alpha errs on a number of grounds. Firstly, there is no reason to assume that our action in the land mobile proceedings is indicative that Channel 66 would ever be affected. Further, we do not accept as correct Alpha's thesis that there is a disparity between higher and lower numbered UHF channels. In the normal circumstances, we would reject such a proposal, but the peculiarities of the situation are such that Channel 38 may be "dropped into" Terre Haute without depriving any other substantial community of an assignment.[3] The situation substantially is that if Channel 38 is not assigned to Terre Haute, it may not be allocated elsewhere in the area. In these circumstances, there is no reason not to make the substitution. We are also unable to agree with Alpha that the appropriate procedure for show cause should be waived, but, since Station WIIL–TV already has submitted technical data as to the channel change and waived a show cause order, we shall treat these as tantamount to Alpha assenting to the channel

[3] Sizeable communities without commercial channels in the area are Olney, Illinois (population 8,976) and Vincennes, Indiana (population 19,867), both with ETV stations (WUSI–TV and WVUT, respectively) and for which other commercial channels are available.

change and a proper submission of technical data. Nonetheless, Alpha must await approval of the technical change and take no step contrary to an authorized construction permit.

6. Authority for the action of the amendment proposed herein is contained in Sections 4(i), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended.

7. In accordance with the foregoing, IT IS ORDERED, That effective November 13, 1972, the Television Table of Assignments (Section 73.606(b) of the Rules) IS AMENDED, with respect to the city listed below, as follows:

City:	*Channel No.*
Terre Haute, Ind	2+, 10, *26, 38

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-838

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.606(b), TABLE OF ASSIGNMENTS, TELEVISION BROADCAST STATIONS. (KEYSER, W. VA.)	Docket No. 19538 RM-1965

REPORT AND ORDER

(Adopted September 20, 1972; Released September 26, 1972)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT.

1. On July 11, 1972, the Commission issued a Notice of Proposed Rule Making in the above-entitled matter, proposing to assign Channel 48 to Keyser, West Virginia, and to reserve it for noncommercial educational use. The proceeding was instituted on the basis of a petition filed by the West Virginia Board of Regents (the Regents), licensee of noncommercial educational TV Station WWVU-TV, Morgantown, West Virginia. Interested parties were invited to comment on the proposal on or before August 22, 1972, and could reply to such comments on or before September 1, 1972. There were no oppositions to the proposal. Supporting comments were filed by the petitioner.

2. Keyser, West Virginia, a community of 6,586 persons, located in Mineral County which contains a population of 23,109 [1], at the present time has no television assignment. Petitioner contemplates a system of translators to bring educational television service to various parts of the State of West Virginia. As a component of this system, the proposed Keyser channel would be used for a translator which would receive the signal of Station WWVU-TV, Morgantown, for relay to other locations in the West Virginia panhandle area. The area to be served by the Keyser proposed operation is described as physically isolated from the rest of the state and economically distressed. On this basis the Regents urge assignment of Channel 48 so that the Keyser area may be linked with the rest of the state and benefit from the offerings of the State University station. Petitioner's engineering statement indicates that the only UHF assignment within 20 miles (required mileage separation) of Keyser, is the Cumberland, Maryland, Channel 52 assignment. The reference point of Keyser is 18.4 miles from the reference point in Cumberland, 1.6 miles short of the required spacing. However, petitioner's supporting comments indicates a suitable and available transmitter-antenna site exists in the vicinity of Keyser which meets the required 20-mile spacing to the Cumberland reference point.

[1] All populations are based on 1970 U.S. Census.

3. In its supporting comments the Regents state that Channel 48 would be an integral part of a translator system which would serve the eastern panhandle of West Virginia which does not presently receive noncommercial television service from West Virginia stations. The area is physically isolated from the mainstream of the state, and is handicapped by poor highways, limited county resources and low per capita wealth. It lies within the region defined by the Appalachian Regional Commission as an area which is economically distressed. The population in this area is widespread, with most persons living in small towns.

4. The Regents note that Channel 48 would not only serve the Keyser area, but also the rest of Mineral County and Grant County as well. It further recognizes the value and potential of activating Channel 48 as a future broadcast station, in lieu of using it only for a translator, and it intends to explore the matter as the educational television system develops. The Regents indicate that it and Station WWVU–TV work in close cooperation with the West Virginia Educational Broadcasting authority in developing plans to serve West Virginia. It adds that because of the unique characteristics of this area (rugged terrain, scattered populations, low per capita income, limited available funds for education, the nature of the economy, etc.), the future likelihood exists of the school systems and community leaders desiring to activate Channel 48 as a television broadcast station.

5. In view of the above and the fact that the assignment can be accomplished without involving the reassignment of existing channels and also that the use of a site near Keyser would eliminate the potential short spacing problem, we are convinced that it is in the public interest to assign Channel 48 to Keyser, West Virginia, and to reserve it for noncommercial educational use. We stress that use of this channel would have to be accomplished with a transmitter site at normal spacing.

6. Authority for the amendment adopted herein is found in Sections 4(i), 303 and 307(b) of the Communications Act of 1934, as amended.

7. Accordingly, IT IS ORDERED, That effective November 8, 1972, the Table of Assignments contained in Section 73.606(b) of the Commission's Rules and Regulations IS AMENDED, insofar as the community named below is concerned to read as follows:

City:	*Channel No.*
Keyser, W. Va	*48

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72R-282

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
OLVIE E. SISK, IVOUS T. SISK, AND JOEL E. CAMP, D.B.A. TRI COUNTY BROADCASTING CO., EUPORA, MISS.	Docket No. 19026 File No. BP-18016
RALPH MATHIS AND AUBREY FREEMAN, D.B.A. RADIO TUPELO, TUPELO, MISS. For Construction Permits	Docket No. 19027 File No. BP-18220

ORDER

(Adopted September 29, 1972; Released October 3, 1972)

BY THE REVIEW BOARD:

1. The Review Board having under consideration the petition for leave to amend to update application filed August 2, 1972, by Tri County Broadcasting Company;

2. IT APPEARING, That no objections to acceptance of the amendment have been filed within the time allowed therefor;

3. IT IS ORDERED, That the petition for leave to amend IS GRANTED and the amendment IS ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72R-256

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of VOGEL-ELLINGTON CORP. (WHOD), JACKSON, ALA. For Construction Permit	Docket No. 18897 File No. BP-17867
WMAF RADIO, INC. (ASSIGNOR) and VOGEL-MCCREERY CORP. (ASSIGNEE) For Assignment of License of Station WMAF, Madison, Fla.	Docket No. 19299 File No. BAL-6992

ORDER

(Adopted September 19, 1972; Released September 20, 1972)

BY THE REVIEW BOARD:

1. The Review Board having before it a petition to dismiss application, filed May 18, 1972, by WMAF Radio, Inc., and the Initial Decision in Docket No. 18897 (FCC 72D-9, released February 8, 1972);

2. IT APPEARING, That in its petition, WMAF Radio, Inc., states that the reason for its request is that the contract for assignment of license for Station WMAF, Madison, Florida, has expired prior to Commission grant of the application;

3. IT FURTHER APPEARING, That no pleadings in opposition to this request have been filed;

4. IT IS ORDERED, That the petition to dismiss application, filed May 18, 1972, by WMAF Radio, Inc., IS GRANTED, and the application for assignment of license for Station WMAF (BAL-6992) IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72R-273

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of GLENN WEST, PORTLAND, IND.	Docket No. 17916 File No. BPH-5820
SOUNDVISION BROADCASTING, INC., PORTLAND, IND. For Construction Permits	Docket No. 17917 File No. BPH-5899

APPEARANCES

B. Jay Baraff, on behalf of Soundvision Broadcasting, Inc.; *Samuel Miller, Stephen H. Gold* and *Mark E. Fields*, on behalf of Glenn West; and *Gerald Zuckerman* and *William D. Silva*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted September 26, 1972; Released September 29, 1972)

BY THE REVIEW BOARD: BERKEMEYER, NELSON, AND PINCOCK.

1. The above captioned, mutually exclusive applications, for construction permits for a new FM station in Portland, Indiana, together with the application of Graphic Printing Company (Graphic), were designated for comparative hearing by Commission Order, FCC 67-1328, released December 28, 1967, 33 FR 551. Thereafter, Graphic was reimbursed for its expenses incurred in the preparation and prosecution of its application by Soundvision Broadcasting, Inc. (Soundvision) and, pursuant to an agreement, its application was dismissed (12 FCC 2d 677, 13 RR 2d 28 (1968); 12 FCC 2d 894 (1968)). By Memorandum Opinion and Order, 12 FCC 2d 674, 13 RR 2d 2 (1968), an issue concerning the financial qualifications of Glenn West was added by the Review Board. After a hearing conducted by Administrative Law Judge Isadore Honig, and a supplemental hearing conducted by Administrative Law Judge Charles Frederick,[1] Presiding Judge Frederick issued his Initial Decision, FCC 69D-54, released October 24, 1969. The Initial Decision, which found Glenn West to be financially qualified, concluded, upon comparison of the two applicants, that a grant of West's application and denial of the application of Soundvision would best serve the public interest. Extensive exceptions to the Initial Decision were filed by Soundvision, and the Broadcast Bureau replied to those exceptions. While the matter was pending before the Review Board, Glenn West, on December 19, 1969, filed a

[1] Presiding Judge Frederick was assigned to this proceeding by Order of the Chief Administrative Law Judge, FCC 68M-1652, released December 12, 1968.

petition to enlarge the issues. West's petition was granted, the issues enlarged, and the record reopened and remanded to the Presiding Judge for hearing on the issues added by Review Board Order, FCC 70R–180, released May 14, 1970, 23 FCC 2d 235, 19 RR 2d 29. Soundvision subsequently filed petitions to enlarge the issues on June 23, 1970 and August 4, 1970. These petitions were granted by Review Board Orders, FCC 70R–294, released August 24, 1970, 31 FCC 2d 803, 19 RR 2d 1131, and FCC 70R–387, released November 17, 1970, 26 FCC 2d 1015, 20 RR 2d 695. Further hearing was held on those issues, and the Presiding Judge released his Supplemental Initial Decision, FCC 71D–81, on November 3, 1971, proposing to deny the application of Soundvision and grant the application of Glenn West. Soundvision filed exceptions to the Supplemental Initial Decision, the Broadcast Bureau filed a statement in support of and exception to the Supplemental Initial Decision, and a reply to the exceptions was filed by the Broadcast Bureau. The Review Board heard oral argument in this matter on July 25, 1972, and, in view of its consideration of the Initial Decision, the Supplemental Initial Decision, the exceptions, the oral argument and the record in this proceeding has concluded that both applications must be denied.

2. No exceptions were filed to the Presiding Judge's conclusion in his Initial Decision (FCC 69D–54, released October 24, 1969) that Glenn West is financially qualified, and the Review Board is satisfied that his findings of fact fairly reflect the record and support his conclusion. The Board will therefore adopt the Presiding Judge's findings and conclusions that Glenn West is financially qualified to construct his proposed FM station and to operate it for one year without reliance on revenues. Since the ultimate disposition of this case turns on the resolution of basic qualification issues as to each applicant which were added by the Review Board after the issuance of the Presiding Judge's first Initial Decision, we shall not undertake a comparative evaluation of the applicants.[2]

3. *Soundvision-Misrepresentation or Lack of Candor and Section 1.65 Issues:* Mr. Omer K. Wright, president and 25% stockholder of Soundvision, is also a 25% stockholder and manager of Triad CATV of Indiana, Inc. (Triad), which operates a CATV system in Portland, Indiana. During the first hearing, Mr. Wright testified that the CATV system had no plans to originate programming other than time, weather and emergency announcements.[3] The Presiding Judge referred to this testimony in his Initial Decision of October 24, 1969, at ¶ 4 of the conclusions where he considered the question of diversification of media of mass communications and observed:

"Possibly, if Soundvision is successful, the FM plus Mr. Wright's interest in the CATV would generate much more potential influence on the listeners-viewers than would the combination of the AM and FM but, of course, this is only speculation at the present time in the light of Soundvision's protestation that it will originate only such fare as time, weather, temperature, and emergency warning announcements on CATV."

[2] The lottery issues which were added by the Review Board are "comparative" and will not be reached by the Board in this decision. See 26 FCC 2d 1015, 20 RR 2d 695.

[3] At the time of this testimony the CATV system was franchised but had not yet commenced operation.

Soundvision filed its exceptions to the Initial Decision on November 24, 1969. In exception No. 15, Soundvision challenged the propriety of the above quoted language of the Initial Decision and stated;

"The [Presiding Judge] has improperly interjected a personal surmise which is totally unsupported by any evidence of record in this proceeding, and on the basis of that evidence before him should have concluded that this CATV system would do no significant program origination (tr 561, 605)."

In its brief in support of exceptions at page 22, ¶ 38, Soundvision stated,

"Further that there is unrebutted testimony that there will be no local origination on this CATV system (tr 561, 605). Thus the CATV system will not be an 'originating' voice seeking to influence, inform, persuade, etc. local residents of Portland but rather a conduit of distant voices."

On December 19, 1969, while the Initial Decision was pending before the Review Board, West filed a petition to enlarge issues which called the Board's attention to Soundvision's reiteration that the CATV system would not originate programming, and alleged that Triad had been at the time the petition was filed, and was then, carrying locally originated programming which had been sponsored by various local businesses. This allegation was supported by the affidavits of Keith Rutledge, Jr.[4] and Pat Reinhard, Jr.[5] and photocopies of certain newspaper advertisements promoting the CATV system's live play-by-play coverage of Portland High School night football games. Soundvision opposed the petition, contending that as of that date it was carrying no locally originated video programming; that the audio only coverage of high school football and basketball games cannot be considered "local programming" as that term was used during the hearing or as it is understood by the Commission; that its video coverage of the county fair was only six hours and done experimentally with borrowed equipment, that its audio only high school sports coverage was in the public interest; and that Glenn West's petition was inexcusably late filed. The Review Board, by Memorandum Opinion and Order, FCC 70R–180, *supra* added the following issues:

(a) To determine the nature and scope of local programming origination by the Portland, Indiana CATV system (Triad CATV of Indiana, Inc.), past, present and planned;

(b) To determine, in light of the evidence adduced under Issue (a) above and the representations made in this proceeding concerning the nature and scope of the Portland CATV system's program origination, whether Soundvision Broadcasting, Inc. has engaged in misrepresentation or conduct lacking in candor in its dealings with the Commission, and if so, the effect thereof on the basic and/or comparative qualifications of Soundvision Broadcasting, Inc. to be a Commission licensee;

(c) To determine whether Soundvision Broadcasting, Inc. has failed to report substantial changes in matters involving its application as specifically referred to in this Memorandum Opinion and Order as required by Section 1.65 of the Commission's Rules, and, if so, the effect of such non-compliance on the basic and/or comparative qualifications of Soundvision Broadcasting, Inc. to be a Commission licensee;

[4] Keith Rutledge, Jr. is a former employee of West. Rutledge, at the time Triad is alleged to have carried the Portland High School football games, did play-by-play accounts of local sporting events in Portland, Indiana.

[5] Pat Reinhard, Jr. is a local resident who has acted as scorekeeper at some of the games which were allegedly carried by Triad.

and remanded the proceeding to the Presiding Judge for further hearing.

4. It is clear from the record developed under the foregoing added issues, and conceded by Soundvision, that Triad operates a CATV system in Portland, Indiana, which utilizes 12 channels, none of which is reserved for local program origination; that it owns no local program origination equipment; and that during the week of August 3, 1969, using borrowed equipment, Triad presented six hours of video taped programming originated at the Jay County Fair. It is also clear that in 1970, Triad presented video taped portions of the Jay County Fair during the first week in August, and that it presented audio-visual coverage of the November local elections. Pursuant to arrangements made in the summer and early fall of 1969, Triad presented audio-only coverage of all but two or three of the Portland High School football games and all of the 1969–70 basketball games. Triad also carried all of the 1970–71 Portland High School football and basketball games, four of which were video taped,[6] and plans to continue its video taped coverage of the county fair, local elections and special sport events to the extent that video tape equipment can be borrowed. It will also continue to carry audio-only coverage of all high school football and basketball games. It may purchase a microphone and preamp equipment, which until the time of the hearing had been borrowed, for use in its audio sports presentation, but it has no intention of acquiring video tape equipment nor does it employ any personnel capable of operating such equipment.

5. Mr. Omer K. Wright read the Initial Decision which was released October 24, 1969, and discussed it with his board of directors, and when it was decided to file exceptions, he discussed generally with Soundvision's counsel the exceptions which were to be filed. As noted above, shortly before the Initial Decision was issued, Soundvision had carried the County Fair and had completed its arrangements to carry the High School football and basketball games. In this sequence of events it is most unlikely that the significance of those arrangements would have escaped Mr. Wright in light of the language in ¶ 4 of the Initial Decision to which Soundvision subsequently objected. Moreover, the record also shows that the exceptions and brief, which, *inter alia*, contained the statements as to non-origination quoted in para. 3, *supra*, were signed by counsel and copies mailed to Mr. Wright at the time they were filed with the Commission on November 24, 1969. However, Mr. Wright testified that he did not become aware of the language in the exceptions and brief concerning Triad's intent with respect to local program origination until some two weeks after the pleadings were mailed to him.

6. Thus, at the time the Initial Decision was issued and at the time that Soundvision filed its exceptions and brief, in which it clearly disavowed Triad's intention to present locally originated programming other than time, weather and emergency information, Triad had already presented six hours of video taped coverage of the Jay

[6] Video taped programming in the future depends on the availability of video tape equipment which in the past has been borrowed by Triad from its parent company and operated by Mr. Wright's brother who is president of that company.

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County Fair, had presented an audio-only account of one or more Portland High School football games and had committed itself to carry all of the remaining 1969–1970 football and basketball games. Soundvision's representation in its exceptions and brief concerning Triad's intent with respect to local program origination was therefore erroneous and Mr. Wright's failure to correct this obvious error in the record which was relied upon by the Presiding Judge, in view of the importance of diversification of ownership of media of mass communications in comparative cases, raises questions as to Soundvision's qualifications to be a Commission licensee.[7] Moreover, Mr. Wright testified that he was fully aware of the significance of his ownership interest in Triad CATV and of the necessity to report significant factual changes to the Commission. By way of explanation, he testified that he did not consider the six hour presentation of the Jay County Fair to be "locally originated programming" since in his view it was purely experimental. As to the coverage of high school games, he testified that this matter did not occur to him since at the time he was having a lot of problems getting the CATV system started.

7. We cannot accept Soundvision's argument that carriage of locally originated programming is consistent with Mr. Wright's testimony. We have carefully considered all of Mr. Wright's testimony and must conclude that when fairly read in context it was intended to persuade the Commission that Triad had no present intention to carry locally originated programming and that, while it might consider presenting such programming at some future time, it was very unlikely that Soundvision would carry such programming. Nor are we persuaded that Wright was unaware of the significance of the oral only coverage of the high school games. Wright, by virtue of his extensive administrative and managerial experience with the YMCA and his significant broadcast management experience, should have understood the significance of his program origination in the Commission's comparative evaluation of the two proposals in light of the Commission's stated objective to achieve and maintain diversification of ownership of media of mass communications. Our determination that Wright was aware that such program originations were significant is further buttressed by the fact that he took pains to scrupulously adhere to the requirements of Section 1.65 of the rules by promptly advising the Commission when he divested his interest in a CATV system which was franchised to operate in a nearby community. Since Wright is president of both Soundvision and Triad, Soundvision must be charged with full knowledge of Triad's affairs and held fully accountable for failure to report pertinent changes in those affairs to the Commission. Counsel for Soundvision has argued that at the time he wrote the brief and exceptions, he was not aware of Triad's program origination activity and thus in all good faith he relied on the record. We accept this statement and note that the language used in the brief and exceptions and quoted herein at ¶3 fairly characterize the evi-

[7] *Lorain Community Broadcasting Company*, 13 FCC 2d 106, 13 RR 2d 382 (1968), reconsideration denied 14 FCC 2d 604, 14 RR 2d 155, review denied 18 FCC 2d 686, 16 RR 2d 946 (1969), affirmed *sub nom. Allied Broadcasting, Inc.* v. *FCC*, 140 U.S. App. D.C. 264, 435 F. 2d 68, 19 RR 2d 2071 (1970).

dence of record. Moreover, the exceptions were discussed generally with Wright before counsel proceeded with the case and Wright, according to his own testimony, became aware of the specific language in the brief and exceptions no later than two weeks after the documents were filed, yet he took no action to correct the misrepresentation made to the Commission in those documents. Under all of the circumstances, the Board is constrained to conclude that the misstatement in Soundvision's pleadings before the Commission constituted a misrepresentation of a material fact. Soundvision's argument that the local programs which it provided to its subscribers were in response to a demonstrated local need and thus in the public interest is beside the point. The decisive issue in this proceeding is not the quality of Triad's CATV operation but Soundvision's misrepresentation of a significant fact and on this issue the Examiner's conclusion that Soundvision's application must be denied is fully supported by the fact of record as set forth by the Presiding Judge. Soundvision's application must therefore be denied.[8]

Glenn West

8. *Section 73.93 Issue:* Section 73.93 of the Commission's Rules, at the time this matter was heard, required:

"One or more radio operators holding a valid radio telephone first class operator license, shall be in actual charge of the transmitting apparatus and shall be on duty either at the transmitter location or at the remote control point."

Soundivision in support of its petition to enlarge the issues attached affidavits of Omer K. Wright and Wayne Silverman [9] to the effect that on each of several days Glenn West, the licensee of standard broadcast Station WPGW, Portland, Indiana, had left his transmitter operating but unattended and driven to his home where he picked his wife up and returned to the station. His absences varied from fifteen to twenty minutes and on two occasions the tape which was being broadcast apparently ran out and there was a minute to a minute and one-half of dead air time. In view of these allegations, the Review Board, by Memorandum Opinion and Order, FCC 70R–294, released August 24, 1970, 31 FCC 2d 803, 19 RR 2d 1131, added the following issues:

(a) To determine whether Glenn West has violated Section 73.93 of the Commission's Rules; and if so, how often; for what period of time; and under what circumstances;

(b) To determine, in light of the evidence adduced pursuant to the above issue, whether Glenn West may reasonably be expected to exercise diligently the degree of responsibility required of a Commission licensee, and what effect such conduct should have on Glenn West's basic and/or comparative qualifications to be a Commission licensee; and

9. Glenn West has conceded that on 200 to 300 occasions during a period of time running from late 1968 through June of 1970 he left his transmitter unattended while he drove to his home and returned to the

[8] *WOKO, Inc.* v. *FCC*, 329 U.S. 223.
[9] Wayne Silverman is an employee of Triad.

station in order to bring Mrs. West to the station. By way of mitigation. West testified that:

> "Until recently, I have been under a misapprehension concerning Commission regulations with respect to the requirement of having a first class engineer at the transmitter at all times. On September 18, 1952, the Federal Communications Commission sent me an advisory opinion concerning requirements on this subject (see attached). The Commission's letter stated that 'at least one first class operator will be employed at the station and will be available on call at all times in the event of equipment failure'. I interpreted this to mean that, while a first class operator had to be employed full time at the station, he could leave for short periods if it were in the course of his duty."

West also testified that Mrs. West was the only other station employee, that she was needed at the station, and that there was no suitable public transportation in Portland, Indiana. Thus, he contends, his absence from the station to drive to his home and bring his wife to the station was "an extreme emergency in the interest of the station" and was permitted by his understanding of the rules at that time. West further stated that he is now aware that his transmitter must at all times be attended by a properly licensed operator and that at no time must the operator leave while the transmitter is in operation. Because of his new understanding of the Rules, West has now made arrangements to have a neighbor, who is paid for his services, bring Mrs. West to the station. The Presiding Judge, taking the foregoing facts and testimony into account, concluded that:

> However, it is concluded that West's violation of this Rule, in and of itself, does not reflect so adversely on West's qualifications to be a Commission licensee as to require denial of his pending application. Although West admittedly violated Section 73.93 of the Commission's Rules, it is concluded that he may reasonably be expected to exercise the degree of responsibility required of a Commission licensee, especially in view of the corrective action which he has taken which should prevent recurrence of the violations.

10. The Board cannot accept this conclusion. We fully agree with the Presiding Judge's observation that the Commission letter dated September 18, 1952, upon which West purports to rely, affords no basis for his belief that he might leave his station in operation but unattended for short periods of time "in extreme emergencies and in the interest of the station". Moreover, we must view West's conduct in light of the fact that he is not only required to know and understand the Commission's Rules as a licensee of a broadcast station, he is also a licensed first class radio operator and thus charged with a full knowledge of rules and regulations which are applicable to the station he operates. Moreover, even if West's prior interpretation of the rule were correct, the factual situation described in the record would not warrant his absence from his station for even a short period of time on several days each week for a period of over one and one half years. It is clear that even though Mrs. West was needed at the station other arrangements for her transportation could have been made, as they were immediately after the June 23, 1970 petition to enlarge issues was filed. Thus, we must conclude that West's failure to scrupulously adhere to the requirement of Section 73.93 of the Commission's Rules in operating his AM station was a knowing disregard of the

Commission's Rules and does not augur well for the operation of a new FM station. For, while the Board does not presume to determine the effect of this record on West's qualifications to continue the operation of his existing AM station, it is convinced that West's operation in clear violation of the Commission's Rules should not be rewarded with another station. Therefore, Glenn West's application for a new FM station at Portland, Indiana, must be denied.[10]

11. Accordingly, IT IS ORDERED, That the application for a new FM station utilizing 100.9 MHz at Portland, Indiana, by Glenn West, Docket No. 17916, File No. BPH–5820 IS DENIED; and

12. IT IS FURTHER ORDERED, That application for a new FM station utilizing 100.9 MHz at Portland, Indiana, by Soundvision Broadcasting, Inc., Docket No. 17917, File No. BPH–5899 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
DEE W. PINCOCK, *Member, Review Board.*

APPENDIX

RULING ON EXCEPTIONS TO THE INITIAL DECISION FILED BY SOUNDVISION, INC., NOVEMBER 24, 1969

Since we made no comparative evaluation of the proposals in this proceeding we have not ruled on the merits of those exceptions all of which are directed to the Examiner's treatment of the comparative issue.

EXCEPTION FILED BY BROADCAST BUREAU

In view of the Presiding Judge's subsequent correction of his Supplemental Initial Decision and the Board's disposition of this case, no action on the Bureau's exception is necessary.

Rulings on exceptions to the supplemental initial decision filed by Soundvision, Inc., December 31, 1971

Exception No.	*Ruling*
1	*Granted* in substance. See ¶ 6 of this Decision.
2	*Granted* to the extent indicated in ¶ 5 of this Decision and *denied* in all other respects. See ¶ 6 of the Decision.
3, 4	*Denied.* See ¶ 7 of this Decision.
5, 8, 9	Since these exceptions bear on a comparative consideration of the applicants we have not ruled on them.
6	*Denied.* See ¶ 6 of this Decision.
7	*Granted* for the reasons stated in ¶ 9 and 10 of this Decision.
10	*Granted* in part and denied in part. See ¶ 11 and 12 of the Decision.

[10] *Du Page County Broadcasting, Inc.*, 70 FCC–159, released February 13, 1970, 21 FCC 2d, 351, 18 RR 2d 321; FCC 70–492, released May 15, 1970, 23 FCC 2d 22, 19 RR 2d 568.

F.C.C. 69D-54

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of GLENN WEST, PORTLAND, IND. SOUNDVISION BROADCASTING, INC., PORTLAND, IND. For Construction Permits	Docket No. 17916 File No. BPH-5820 Docket No. 17917 File No. BPH-5899

APPEARANCES

Joseph Chachkin and *Mark E. Fields* on behalf of Glenn West; *Roger E. Zylstra* and *B. Jay Baraff* on behalf of Soundvision Broadcasting, Inc.; and *Gerald M. Zuckerman* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER CHARLES J. FREDERICK

(Issued October 22, 1969; Released October 24, 1969)

PRELIMINARY STATEMENT

The mutually exclusive applications of the Graphic Printing Co., Inc. (Graphic), Glenn West (West) and Soundvision Broadcasting, Inc. (SBI), all seeking authorization to construct a new FM radio facility in Portland, Indiana, were designated for hearing (FCC 67-1328, released December 28, 1967) upon the following issues:

1. To determine which of the proposals would best serve the public interest.[1]
2. To determine in the light of the evidence adduced pursuant to the foregoing issue, which of the applications for construction permit should be granted.

By virtue of Review Board Order (12 FCC 2d 674), the following issue was added with respect to West:

(a) The basis of the applicant's estimated construction costs and operating expenses for the first year of operation.

(b) The amount of funds available to meet the costs of construction and the costs of operating during the first year.

(c) In the event the applicant will rely on operating revenues during the first year to meet fixed charges and operating costs, the basis for the applicant's estimate of revenues and whether such estimate is reasonable.

(d) In light of the evidence adduced pursuant to (a), (b), and (c), above, whether the applicant is financially qualified.

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[1] Paragraph 2 of the designation order provided that "for the purposes of comparison the areas and populations within the 1 mv/m contours together with the availability of other FM services of 1 mv/m or greater intensity in such areas will be considered under the standard comparative issue, for the purpose of determining whether a comparative preference should accrue to any of the applicants."

Graphic's application was dismissed with prejudice upon the joint request of Graphic and SBI (12 FCC 2d 677 and 12 FCC 2d 894). Prehearing conferences were held on February 8 and May 9, 1968. The evidentiary hearing took place on June 25–27 and July 23, 1968. The record was initially closed on July 23, 1968. On the Examiner's own motion the record was reopened and again closed by Order (FCC 68M–1135) released August 2, 1968. Thereafter the following Order (FCC 68M–1652) was issued:

ORDER

Issued December 12, 1968; Released December 12, 1968.

IT IS ORDERED, subject to objection by any interested party which may be filed within five days of the issuance of this action, that because of the workload of Isadore A. Honig, who presided in the hearings herein, he is relieved of further participation in the case, and that Charles J. Frederick shall prepare and issue an initial decision in the matter.

FEDERAL COMMUNICATIONS COMMISSION,
/S/ James D. Cunningham,
JAMES D. CUNNINGHAM,
Chief Hearing Examiner.

No objection was received, and the present Hearing Examiner reopened the record, taking evidence on AM reception services. The record was finally closed on April 9, 1969. Supplemental proposed findings and conclusions have been timely filed by all parties.

FINDINGS OF FACT

COMPARATIVE COVERAGE

1. Glenn West (West) and Soundvision Broadcasting, Inc. (SBI) each seek a new Class A FM broadcast station in Portland, Indiana for operation on Channel 265A (100.9 MHz) with an effective radiated power of 3 kilowatts. In addition to the normal horizontal polarization, each applicant also proposes the use of vertical polarization with a power of 3 kilowatts. The West and SBI proposals call for antenna heights above average terrain of 180 feet and 300 feet, respectively. The applications are mutually exclusive.

2. Portland, a city of 6,999 persons and the seat of Jay County, Indiana (pop. 22,572) is located some 75 miles northeast of Indianapolis near the Indiana-Ohio state line.[2] The city is not part of any urbanized or standard metropolitan statistical area. Portland has one AM station but no FM or TV broadcast station. The AM station, WPGW, is licensed to West and operates daytime only as a Class III station on the frequency 1440 kHz with a power of 500 watts, directionalized.

[2] Unless otherwise noted, population data reflect the 1960 U.S. Census.

3. The transmitter site of West is located about 2.4 miles west of the center of Portland.[3] SBI's transmitter site is 1.4 miles southwest from the center of the city and approximately 1.5 miles southeast of West's site. West's proposed 1 mv/m contour reaches from 9.5 miles to 14 miles from Portland, the lesser distances prevailing over the eastern sector and the greater distances over the western sector. In the case of SBI, the proposed 1 mv/m contour extends from about 14 miles to 16 miles from the center of the city, the greater reach of the contour prevailing over the western sector. The areas encompassed by the respective proposed 1 mv/m contours are approximately circular in shape.

4. The area defined by West's proposed 1 mv/m contour is completely within the proposed 1 mv/m contour of SBI and the annular area between the two contours varies from 2 to 5 miles in width. The following table shows comparative coverage and the availability of other FM services (1 mv/m or greater) to the areas within the respective proposed 1 mv/m contours:

	West		SBI	
	Population	Area [1]	Population	Area [1]
1-mv/m contour (total)	21,194	395	39,093	[2] 739
No existing service	18,874	297	23,897	378
One existing service	2,037	85	13,936	314
Two existing services	283	13	1,240	45
Three existing services			20	2

[1] Square miles.
[2] SBI shows the total area within its proposed 1-mv/m contour to be 708 square miles. However, the sum of the "service pockets" totals 739 square miles. The population data tally correctly.

5. None of the four stations that serve portions of West's proposed service area or the eight stations that serve portions of SBI's proposed service area include as much as 25% of either proposed service area. The four FM stations that provide coverage to parts of the area within West's proposed 1 mv/m contour are WIUC in Winchester, WPTV in Fort Wayne, WHHC in Hartford City, and WMRI in Marion, all in Indiana. These four stations and the following four additional FM stations serve parts of the area encompassed by SBI's proposed 1 mv/m contour: WCRD in Bluffton, WKJG–FM in Fort Wayne, and WMUN in Muncie, Indiana, and WCSM–FM in Celina, Ohio.

6. In the area outside West's proposed 1 mv/m contour but inside SBI's proposed 1 mv/m contour, SBI will serve 17,899 persons in 334 square miles of which 5,023 persons in 81 square miles are without an existing FM service of at least 1 mv/m, 11,899 persons in 229 square miles have only one such service, 957 persons in 32 square miles have two such services, and 20 persons in 2 square miles are the recipients of three services.

7. In its first findings and conclusions the Broadcast Bureau concluded that SBI was entitled to a "substantial preference over West in the area of comparative coverage."

[3] This is the same site employed by West's AM station, WPGW. The FM radiator will be side-mounted on the WPGW tower.

8. The Bureau's "Supplemental Conclusions" dated April 23, 1969 are brief and are quoted practically *in toto* as follows:

1. As indicated in paragraphs 1–3 of the Bureau's previously filed "Conclusions" grant of the Soundvision Broadcasting, Inc. (SBI) application would bring an additional service to the entire area that West proposes to serve, plus an additional area of 334 square miles with a population of 17,899. Noting that there was a scarcity of existing FM service of 1 mv/m or greater to the 17,899 people that would be served by SBI, but not West,[4] the Bureau concluded that SBI was entitled to a "substantial preference over West in the area of comparative coverage."

2. In a recent decision the Commission stated that "it is entirely appropriate to consider fully the pertinent aspects of available AM service when we are engaged in the process of resolving conflicting demands for new FM broadcast stations." See *Cherokee Broadcasting Company*, 17 FCC 2d 121. In *Cherokee* the Commission anticipates the day AM and FM stations will be component parts of an integrated aural service. In the *Cherokee* case the availability of AM reception services was particularly significant because there was a total absence of FM service within the 1 mv/m contours of either applicant. Although the instant proceeding does not present such an extreme set of circumstances, the scarcity of existing FM services within the area served by SBI, but not by West, mandates that the availability of AM services be considered before it can be determined whether SBI is entitled to a comparative preference.

3. Ten standard broadcast stations provide primary daytime service to the entire area that would be served by SBI but not by West. Other stations serve portions of the differential area. A minimum of 12 and a maximum of 19 stations serve any one portion of the area in question during the daytime. At night a minimum of 3 and a maximum of 5 stations serve any portion.

4. The policy expressed by the Commission in *Cherokee*, requires us to re-evaluate the "substantial preference" which we previously recommended be awarded to SBI on the basis of its greater coverage. In view of the fact that the entire area to be served by SBI and not by West receives other *aural services*, SBI is entitled to only a slight preference under the comparative coverage aspect of the comparative issue.

COST OF CONSTRUCTION

9. West will purchase his transmitter, antenna system and monitors from Gates Radio Company at a cost of $19,666.00, of which $9,800 will be deferred beyond West's first year of operation. West already owns the land and a twelve room studio building from which he operates his AM station and will use these facilities for the proposed FM operation without incurring any additional costs. Studio equipment, a record and tape library, and office fixtures are on hand and will be used in the FM operation.

10. West has allocated an additional $3,000 for "other items." He proposes to pay his professional fees (legal and engineering) from this fund. West has paid for his engineering services rendered up to the time of the hearing. An additional expense of $300 will be incurred for side mounting the FM antenna on the AM tower. The mounting of the FM antenna will necessitate a proof of performance on the AM which will cost from $500 to $600. Attorney fees above $2,500 will be deferred beyond West's first year of operation if payment would affect his financial qualifications.

11. West will therefore incur non-deferred equipment expenses totalling $9,866, plus side mounting and proof of performance expenses of from $800 to $900 and must be prepared to pay his attorney up to

[4] 5,023 receive no such service, 11,899 receive one and the remaining 977 persons receive two or three FM services.

$2,500 for legal services. Assuming that West will incur the upper limits of his estimated non-deferred construction costs, he will require a total of $13,266 to construct his FM station.

COST OF OPERATION

12. West will employ three "general purpose" employees at $4,000 each for his FM broadcasting which will require approximately 100 hours of announcing each week. Mr. West and his wife, who operate the AM station, will also devote time to the FM station. The Wests do not draw a salary. Other expenses, which include power and lighting, tubes, line and wire facilities, royalties and license fees, records and tapes, travel expenses, telephone, local taxes, Social Security contributions and news wire service charge will amount to an additional $6,150. Additionally, West, who is purchasing equipment upon a deferred credit agreement, will incur interest charges of $943.50 pursuant to that agreement during his first year of operation. Thus, West's first year operating expense will be $19,093.50. West's combined operating expense and non-deferred construction cost is $32,362.50.

AVAILABILITY OF FUNDS

13. West is not relying upon revenues in order to establish his financial qualifications. He has bank accounts totalling $17,000 and $1,000 in cash on hand. He also has between $1,500 and $2,000 in accounts receivable. He has no liabilities. Mrs. West, who has bank accounts totalling $29,426.36, has agreed to make these funds available to her husband for the construction and operation of the proposed station. She does not have any liabilities. Both Mr. and Mrs. West own real estate which they would mortgage in order to raise additional funds if such funds were needed for the construction and operation of the station.

The value of the land is in dispute. It is apparent that it will not be necessary for the Wests to mortgage their property in order to finance the proposal. Although the property certainly has value, it is not necessary to determine this value.

14. The Broadcast Bureau has concluded that West has met its burden on the added issue of financial qualification.

THE APPLICANTS

15. *Glenn West*, an individual (sole party), is an applicant for an FM station in Portland, Indiana, operating on Channel 265. He is the licensee (sole party) of Station WPGW, a standard broadcast station in Portland. WPGW, which went on the air on January 14, 1951, is a daytime-only station, operating on 1440 kc, with power of 500 watts.

16. Mr. West was born in Portland, Indiana on May 22, 1905. With the exception of approximately six years (between 1918 and 1924) spent in and around Lansing, Michigan, he has resided continuously in Portland. Thus, Mr. West's residence in Portland totals 57 years. He attended night school in order to further his general education, and also completed separate electrical engineering and radio courses. He also served an extensive apprenticeship at the Motor Wheel Corporation in Lansing, and was later promoted to chief construction and maintenance man supervising a force of eleven assistants.

17. Following World War II, Mr. West opened the first radio service and electrical appliance store in Portland which he successfully operated until 1951. In 1951, Mr. West disposed of this business in order to devote fulltime to Station WPGW. In the course of operating his radio and electrical appliance business, he pioneered in Portland such things as fluorescent lighting, open window displays, and the use of public address systems.

18. Mr. West has been and now is involved in every phase of the operation of Station WPGW, and oversees it on a full-time basis. He holds a first-class radio-telephone operator's license and performs the duties of chief engineer. He will perform similar functions for the FM station, and is prepared to devote even more time, if necessary, to operate the station. WPGW is the only station in which Mr. West has had an ownership interest. In addition, he has not been an employee of any other broadcast station. However, prior to 1950, Mr. West built and serviced remote and recording equipment and fed many programs from local churches to surrounding stations.

19. Mr. West has been married since 1933, and his wife participates in the radio station's operation. Mr. West is a church member and belongs to several local organizations. His operation of a radio service and electrical business prior to 1951 and his operation of Station WPGW for the last 18 years have kept him in contact with the people of Portland and have contributed to keeping him informed of their needs, interests, and desires.

20. The proposed FM station will operate between the hours of 6:00 A.M. and 11:00 P.M. Its programming will be independent of the AM operation except for those daytime hours in which ABC network programs are carried on the AM station. During those hours there will be a duplication of programming.

21. *Soundvision Broadcasting, Inc.* is a corporation consisting of the following officers, directors and stockholders:

Name and residence	Office held	Director	Shares held or subscribed	Percent of ownership
J. G. Meeker, 1333 S. Meridian, Portland, Ind.	Vice president.	Yes	180	30
Bob W. Delauter, Route 2, Portland, Ind.	Secretary treasurer.	Yes	150	25
Omer K. Wright, 907 Myrtle Avenue, Dixon, Ill.	President	Yes	150	25
G. E. Maitlen, Box 1046, Route 2, Portland, Ind.			30	5
Ernest N. Marshall, Route 1, Portland, Ind.			30	5
Fred Smetana, 248 Charles Street, Portland, Ind.			30	5
Ralph M. Steffy, M.D., 321 E. Race Street, Portland, Ind.			30	5

22. No Soundvision stockholder currently has any financial interest in any other broadcast facilities or newspapers. Mr. O. K. Wright, a 25% stockholder in Soundvision, has subscribed to or holds 50.5% of the common stock of Soundvision, Inc. (a separate Illinois corporation), which, at the time of the hearing, held CATV franchises in Dixon, Illinois and Portland and Hartford City, Indiana. As of the hearing, none of the CATV systems were in operation, although the one in Portland was scheduled to begin on July 22.[5] Neither Dixon,

[5] See Appendix A. Also, Mr. Wright's ownership in Soundvision, Inc. has been reduced to 25%.

Illinois nor Hartford City, Indiana are within Soundvision's proposed 1.0 mv/m contour.

23. Except for the origination of time, weather, temperature, and emergency warning announcements, Mr. Wright has no plans for program origination on the Portland CATV system.

24. Soundvision has established stockholder and citizen advisory committees, to enable it to run the station more effectively, i.e., in order to be sensitive to the changing needs and interests of the community. The committees and their members are as follows:

Stockholder and Citizen Advisory Committees

Key to Abbreviations: O—Officer, B—Board Member, S—Stockholder, M—Manager, CA—Citizen Advisory Member.

Station Operations Committees

Building and Facilities Committee:	
J. G. Meeker, Chairman	(O, B, S)
Bob Delauter	(O, B, S)
O. K. Wright	(O, B, S, M)
Finance Committee:	
Bob Delauter, Chairman	(O, B, S)
J. G. Meeker	(O, B, S)
O. K. Wright	(O, B, S, M)
Programming Committee:	
Fred Smetana, Chairman	(S)
Ernest Marshall	(S)
O. K. Wright	(O, B, S, M)
Commercial and Public Relations Committee:	
J. G. Meeker, Chairman	(O, B, S)
Fred Smetana	(S)
O. K. Wright	(O, B, S, M)
Bob Delauter	(O, B, S)

Community Relations and Public Service Committees

Ed Maitlen, Chairman	(S)
Dr. Ralph Steffy	(S)
O. K. Wright	(O, B, S, M)
Civic and Local Government Relations:	
Ed Maitlen, Chairman	(S)
F. M. (Ted) Montgomery	(CA) Immediate Past Mayor.
Robert Ford	(CA) Incumbent Mayor.
Wm. Horton	(CA) Pres., Chamber of Commerce.
Education Relations:	
Ernest Marshall, Chairman	(S)
Jack Mink	(CA) General Manager, Armstrong Cork, Dunkirk, Indiana.
Hugh Miller	(CA) School Board Member V.P., Jay Garment Co.
Sports and Recreational Activities:	
Ernest Marshall, Chairman	(S)
F. M. (Ted) Montgomery	(CA) Former Mayor Play-by-Play Announcer.
Agricultural Relations:	
Bob Delauter, Chairman	(O, B, S)
Health, Safety, Hospital, Welfare Relations:	
Dr. Ralph Steffy, Chairman	(S)
Religious Relations Committee:	
Bob Delauter, Chairman	(O, B, S)
Dr. Ralph Steffy	(S)
Rev. Paul Stephenson	(CA) Member Ministerial Assn. Moderator—religious broadcast program.

The President and General Manager of Soundvision Broadcasting, Inc. is an *ex officio* member of all of these committees.

25. Each committee will meet monthly, or more often if needed, to consider the needs, interests and desires of the community. Each individual committee will submit suggestions to the Board through its chairman, or through the Manager in urgent matters. The Board will in turn consider the necessary action on all proposals or suggestions.

26. The duties of the above committees are continuous, notwithstanding that the committees will ordinarily meet only once a month. Each committee member, in his activities, will be expected to note and report to Mr. Wright any matters of significance to the station. Considerable evidence was offered as to committee functions; however, their titles are self-explanatory.

27. If Soundvision is successful in obtaining a construction permit, its president, Mr. Wright, will serve as full-time general manager of the station and will have responsibility for all day-to-day decisions and operations. He will have the responsibility of coordinating all departmental functions and station relationships in an attempt to insure high quality performance consistent with the needs and interests of Portland and Jay County. He will have the ultimate responsibility for selecting and directing the various staff members.

28. It will be Mr. Wright's duty to maintain up-to-date knowledge of FCC rules, regulations, and policies. He will route, post, and otherwise give instructions regarding appropriate and applicable rules, regulations and policies. Likewise, he will see that proper records are kept.

29. On Page 5 of Section IV–A of Soundvision's application, the following information was provided to the Commission:

> "President of the corporation, O. K. Wright, will determine day-to-day decisions until a competent full-time station manager is thoroughly trained and able to assume these decisions. At all times the station manager will be responsible directly to the applicant's Executive Committee of the Board of Directors."

30. Mr. Wright anticipates that he will spend at least 10 to 20 hours a week participating in committee meetings during the initial stages of the project, and will spend at least five to six hours a week on them after the station becomes operational. Moreover, Mr. Wright asserts that he will be in charge of the station when it goes on the air and that he will be General Manager. He will train a Station Manager, which, he says, will take at least two to three years. At the end of this training time, Mr. Wright has no plans for terminating his position with the station, and he asserts he will continue as General Manager and will remain on the payroll in a full-time position. It is not clear why it would take at least two to three years to train a Station Manager. Nor, of course, is the record reflective of how he would manage to be in a full-time position and handle any duties he may have, or will incur in the CATV business.

31. *J. G. Meeker* anticipates that he will work from six to ten hours a week on behalf of the station during the first three to six months of its operation, and will work approximately three or four hours every week thereafter. His work for the station will relate to other of his activities such as work with the Boys Club, Church, and Rotary Club.

Mr. Meeker will attempt to get school groups together, to discuss local problems, and will take an interest in ascertaining programming needs and making arrangements for programming presentations in response to these needs. He feels that because of his business experience and his residence for 58 years in Jay County, he can make a contribution "in selling and various areas of FM."

32. As Chairman of the Finance Committee, *Bob W. Delauter's* duties will include cost control, sales, promotion, building, maintenance and all of the expenses entailed in the operation of the station. Mr. Delauter's pertinent experience includes being Secretary-Treasurer and Manager of the local Coca Cola Bottling Company and a Director of the Citizens Bank in Portland. He also will keep in touch with various segments of the community such as Rotary, Lions, 4–H, Chamber of Commerce, etc. He grew up on a farm and now operates a farm with his Father and brother. He has also been Director of the County Agricultural Fair for the past 10 years, and is Secretary of the Wabash Valley Hereford Association—a three or four county organization that he helped to organize. Mr. Delauter anticipates that he will spend from eight to ten hours a week on his station duties.

33. Messrs. Maitlen, Marshall, Smetana, and Dr. Steffy will contribute about five hours each per week variously in public relations, education, health and the like.

Broadcast Experience

34. *Omer K. Wright* has been engaged in the broadcasting industry almost continuously since 1957 when he became a sales representative of WBCK, Battle Creek, Michigan. Following that, he was a sales representative for WEAU–AM and FM in Evanston, Illinois; WALM in Albion, Michigan (where he also had managerial experience); and WFRL in Freeport, Illinois. He was General Manager for about a year of WIXN in Dixon, Illinois, and as such was responsible to the owners for putting the station on the air and thereafter managing it. Except for engineering, he has engaged in all aspects of broadcasting.

Local Residence and Participation in Civic Affairs

35. *Omer K. Wright* was born in Portland, Indiana on March 16, 1912. If Soundvision is successful in obtaining the construction permit for the proposed station, he will take up permanent residence in Portland.

36. Messrs. Meeker, Delauter, Maitlen, Marshall, Smetana, and Dr. Steffy have long-time ties with Portland and Jay County. Collectively, their professions are diverse: law, medicine, business. Each belongs to some Protestant church denomination and is active in social and civic affairs.

CONCLUSIONS

1. This Hearing Examiner concludes, as did the Broadcast Bureau, that West is financially qualified.

2. It is also concluded that, on the basis of the reopened record, SBI is entitled to only a slight preference under the comparative coverage aspect of the comparative issue.

3. This Hearing Examiner did not, of course, have the opportunity to see and hear the applicants' witnesses in adjudicative sessions. This

decision therefore reflects only a review of the record and is not helped by any personal impressions which may have developed in face-to-face confrontations, so to speak. There was no specific issue on past performance but there is a quantity of "evidence" which the Hearing Examiner would not dignify with the name of evidence, intended to reflect personally on the Wests. It will certainly be ignored for it has no bona fide conclusory significance within this Hearing Examiner's sense of values.

4. Soundvision urges a significant preference re diversification of control of the media of mass communication. This Hearing Examiner believes no preference should be concluded in favor of either applicant in that area of comparison. It seems almost ludicrous to predict dire social-economic consequences from the addition to the West holdings of the FM facility in a service area which does not, really, encompass a great population mass. And it cannot reasonably be assumed all of the West FM listeners would be new and additional to the West AM listeners. It is only logical to believe that FM will take from the AM listeners. Furthermore, there possibly will be some ideological effects from other local sources in virtue of Mr. Wright's interest in the Portland CATV system. At least there seems to be an incipience of local CATV program originations generally in the industry. But, again, Mr. Wright's interest in the CATV is only 25%. Perhaps he is comparing two different kinds of fruit but the Hearing Examiner concludes that the applicants cancel each other out on this score. Possibly, if Soundvision is successful, the FM plus Mr. Wright's interest in the CATV would generate much more potential influence on the listeners-viewers than would the combination of the AM and FM but, of course, this is only speculation at present in the light of Soundvision's protestation that it will originate only such fare as "time, weather, temperature, and emergency warning announcements" on CATV.

5. Soundvision asserts that Mr. Wright, who does not now reside in Portland, will take up permanent residence there if the application is granted. If full faith and credit may be accorded this assertion, then neither applicant has a preference on local residence. The facts would then show that all the people concerned in both applications were residents of Portland.

6. With regard to integration of ownership and management, Soundvision claims an overwhelming preference. In fact, Soundvision reduces West's participation to the irreducible—zero. The record actually reveals that only Mr. Wright will work full-time in the day-to-day operation of Soundvision's station. Of the other stockholders in Soundvision only two, representing 55% of the stock, would put in as much as six to ten hours a *week* at the station, and in the case of one, Mr. Meeker, his work will apparently be duplicative of, or ancillary to, other outside activities he now performs. Other, and much smaller, stockholders would do a smattering of work with the station. In Volume 1 (2d Series), FCC Reports, at page 395, occurs the following language re comparative broadcast hearings:

> 2. *Full-time participation in station operation by owners.*—We consider this factor to be of substantial importance. It is inherently desirable that legal re-

sponsibility and day-to-day performance be closely associated. In addition, there is a likelihood of greater sensitivity to an area's changing needs, and of programing designed to serve the needs, to the extent that the station's proprietors actively participate in the *day-to-day operation of the station.* This factor is thus important in securing the best practicable service. It also frequently complements the objective of diversification, since concentrations of control are necessarily achieved at the expense of integrated ownership.

We are primarily interested in full-time participation. To the extent that the time spent moves away from full-time, the credit given will drop sharply, *and no credit will be given to the participation of any person who will not devote to the station substantial amounts of time on a daily basis.* In assessing proposals, we will also look to the positions which the participating owners will occupy, in order to determine the extent of their policy functions and the likelihood of their playing important roles in management. We will accord particular weight to staff positions held by the owners, such as general manager, station manager, program director, business manager, director of news, sports, or public service broadcasting, and sales manager. Thus, although positions of less responsibility will be considered, especially if there will be full-time integration by those holding those positions, they cannot be given the decisional significance attributed to the integration of stockholders exercising policy functions. *Merely consultative positions will be given no weight.* (Italics supplied.)

Thus, even with the impact of the two stockholders owning 55% of the stock, under the "stern voice" of the above Commission pronouncement, the decisional quantum of owner-integration persuasiveness for Soundvision is a mere "smidgin."

7. In the case of the West proposal, on the other hand, it must be taken into consideration that *Mr. West* is the *sole owner and operator* of his station, although (snide?) innuendoes have been made that, because of an alleged impairment of *Mrs. West's* health, she cannot participate in the operation of the station. So what! The West proposal will use the same (for the most part) electronic and studio facilities in FM as it now uses in AM. That means the same presence of management personnel will be in the same spot at all times. Is the Commission supposed to be deluded into the belief that one person, dedicated for most of his professional life, cannot so divide his efforts, in what is actually a *very small* dual effort, that his participation is utterly diluted? Such a proposition is nonsense. Soundvision brings up the Review Board's decision in *Lewis Broadcasting Corp.*, 11 FCC 2d 889. That decision can have no practical bearing on the instant case. The marbles aren't the same size and the games have different rules and signification calling for different postures and techniques of shooting. After all, Portland, Indiana is not Savannah, Georgia. Portland, Indiana is like everyone's "home town." Or, like everyone would like to believe is his "home town." It is not a large, buzzing metropolis where the selection of a radio applicant would depend upon sophisticated criteria applicable to places as large or larger than Savannah, Georgia.

8. It is concluded that, in the area of integration of ownership in management, West is to be preferred over Soundvision.

9. How should this case be decided? As heretofore mentioned, the writer of this initial decision has seen no one, has met no one, connected with it. It is so easy to judge wrongly in a situation like this. The Hearing Examiner hasn't the slightest notion that Soundvision would not be an estimable and efficient licensee. Who can gainsay the characters and personalities of Soundvision's people? Their intent? No one.

Soundvision would worthily discharge its duty as a licensee in this Hearing Examiner's judgment.

10. On the other hand, here we have the Wests, man and wife, who have pioneered radio in Portland. There is no indication that they haven't tried hard, regardless of the (really unrecognized herein) peccadilloes aimed at them (in retrospect?) in a hard-fought case.

11. In the stern, hot glare of reviewing authorities, the decision of this Hearing Examiner may wilt and fade but, on the bases of long-time "try" in Portland, superior integration of ownership with management, both of which, in the Hearing Examiner's estimation, overcome the slight preference to Soundvision in coverage,[6] it is concluded that an award to West would be more in the public interest than an award to Soundvision.

Accordingly, IT IS ORDERED, that unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the application of Glenn West for a new Class A FM broadcast station in Portland, Indiana to operate on Channel 265A (100.9 MHz) with an effective radiated power of 3 kilowatts IS GRANTED and the application of Soundvision Broadcasting, Inc. for the same facility IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
CHARLES J. FREDERICK, *Hearing Examiner.*

APPENDIX "A"

COLE, ZYLSTRA & RAYWID,
ATTORNEYS AT LAW,
Washington, D.C., September 17, 1969.

Re: Docket No. 17917. File No. BPH 5899

HON. CHARLES J. FREDERICK,
Federal Communications Commission, Room 630,
Washington, D.C.

DEAR MR. EXAMINER: Pursuant to your verbal request, and with consent of opposing counsel, we hereby submit on behalf of Soundvision Broadcasting, Inc. additional information with reference to paragraph 30 of Soundvision's proposed findings of fact and conclusions of law.

Soundvision, Inc., of which Mr. O. K. Wright is a 25% owner (supplement to proposed findings of fact and conclusions of law, 10), is now operating a CATV system in Portland, Indiana. The current number of subscribers is estimated between 550 and 600. Soundvision, Inc. no longer holds franchises in the communities of Dixon, Illinois and Hartford City, Indiana.

We would be pleased to provide further information should it be desired.

Very truly yours,

/S/ Craig S. McCoy
CRAIG S. MCCOY.

[6] After all, West could always equal Soundvision's coverage, engineeringly.

109-011—72——9

F.C.C. 72R-268

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WTAR RADIO-TV CORP. (WTAR-TV), NORFOLK, VA. For Renewal of Broadcast License	Docket No. 18791 File No. BRCT-54
HAMPTON ROADS TELEVISION CORP., NORFOLK, VA. For Construction Permit for New Television Broadcast Station	Docket No. 18792 File No. BPCT-4281

MEMORANDUM OPINION AND ORDER

(Adopted September 26, 1972; Released September 28, 1972)

BY THE REVIEW BOARD:

1. This proceeding involves the application of WTAR Radio-TV Corporation (WTAR) for renewal of license of its television broadcast Station WTAR-TV, operating on Channel 13 in Norfolk, Virginia, and the mutually exclusive application of Hampton Roads Television Corporation (Hampton Roads) for a construction permit to establish a new television broadcast station operating on the same channel in Norfolk. By Order, FCC 70-97, 21 FCC 2d 234, released January 27, 1970, the Commission designated the applications for consolidated hearing on, *inter alia*, the standard comparative issue. By Memorandum Opinion and Order (31 FCC 2d 812, 19 RR 2d 661, released July 20, 1970,[1] the Review Board added, *inter alia*, a cross-interest hearing by Commission Order, FCC 72-142, released February 24, 1972. Presently before the Review Board is a petition to enlarge issue againt WTAR and its parent corporation, Landmark Communications, Inc. (Landmark).[2] The applications were redesignated for issues, filed March 16, 1972, by Hampton Roads,[3] seeking the addition of Rule 1.514(a), Rule 1.65, and false swearing issues against WTAR.[4]

Rule 1.514(a) and Rule 1.65 Issues

2. In support of its request for the addition of Rule 1.514(a) and Rule 1.65 issues, Hampton Roads claims that WTAR failed in its ap-

[1] Review denied FCC 70-1251, released December 7, 1970.

[2] The issue reads as follows: To determine whether interests of principals (including stockholders, officers and directors) of Landmark Communications, Inc., the parent company of WTAR Radio-TV Corporation, would contravene the provisions of § 73.636(a) of the Commission's Rules and/or the Commission's policy proscribing cross-interests in stations in the same broadcast service and serving substantially the same area.

[3] As a result of the Commission's redesignation Order, the petition will be considered as timely filed. See *WPIX, Inc.*, 34 FCC 2d 419, 24 RR 2d 59 (1972), review denied FCC 72-616, released July 19, 1972.

[4] Also before the Review Board are: (a) Broadcast Bureau's comments, filed March 29, 1972; (b) opposition, filed March 29, 1972, by WTAR; (c) response to (a), filed March 31, 1972, by WTAR; (d) reply, filed April 10, 1972, by Hampton Roads; and (e) supplement to (c), filed April 18, 1972, by WTAR.

plication to disclose to the Commission all of the media and business interests of its parent corporation, Landmark, and to report business interests subsequently acquired by Landmark and P. S. Huber, Jr., an officer and director of both WTAR and Landmark. With respect to the Rule 1.514(a) issue, Hampton Roads asserts that WTAR's reporting of Landmark's then-existing CATV interests in WTAR's renewal application is "vague, imprecise and fails to reveal the pertinent facts." According to Hampton Roads, WTAR reported Landmark's CATV interests as follows: "Landmark Communications, Inc. also owns TeleCable Corporation which is engaged, through subsidiary corporations, in the operations of community antenna television systems in several communities in West Virginia, Alabama and North Carolina." In *Media, Inc.*, 22 FCC 2d 875, 18 RR 2d 1175 (1970), reviewed denied FCC 70–1106, released October 7, 1970, petitioner maintains, the Review Board held that the reporting of a CATV "headend" was inadequate and that each community served by the system must be identified separately. Hampton Roads argues that WTAR's failure to disclose Landmark's ownership of CATV systems in Roanoke Rapids, North Carolina; Beckley and Princeton, West Virginia; and Auburn-Opelika, Decatur and Selma, Alabama,[5] is a more serious omission than failure to report communities served by a CATV "headend"; therefore, these systems should have been individually listed in the application form and WTAR's failure to do so warrants, in petitioner's view, addition of a Rule 1.514(a) issue. The requested Rule 1.65 issue is premised on subsequently-acquired CATV systems by Landmark as well as the failure to report the acquisition of newspaper interests. In particular, Hampton Roads asserts that WTAR failed to report after-acquired interests in CATV systems in Wytherville, Virginia; Columbus, Georgia; Bloomington, Illinois; Kokomo, Indiana; Overland Park, Kansas; and Racine, Wisconsin. Petitioner further argues that WTAR failed to amend its application to reflect the acquisition by Landmark of two daily newspapers in Roanoke, Virginia (the Roanoke *Times* and the Roanoke *World-News*) and a semi-weekly newspaper in Galax, Virginia (The Galax *Gazette*). Also, petitioner contends, WTAR did not report Landmark's acquisition of a shopping center in Roanoke, Virginia.[6] A Rule 1.65 issue is further warranted, according to Hampton Roads, because WTAR did not fully report media interests held by P. S. Huber, Jr. in Media General, Inc. (Media General). Huber is vice-president and director of Media General and owns 1,365 Class B (voting) and 10,970 Class A (nonvoting) shares of stock in the company. Hampton Roads claims that Media General's interests which are not reported in WTAR's application are: (1) its two daily newspapers in Winston-Salem, North Carolina; (2) a CATV system in Lakeland, Florida; (3) two newspapers in Newark, New Jersey; and (4) an AM–FM combination also in

[5] To support its factual allegations, petitioner relies on the 1971–72 Services Volume of *Television Factbook*, p. 685a; and the 1971 *Broadcasting Yearbook*, p. A–106.

[6] To support these allegations, Hampton Roads relies on an article, published on October 30, 1969 in the Norfolk *Ledger-Star*. A copy of the article is attached to the petition.

Newark. Failure to report these interests is significant, petitioner argues, because of their close proximity to one another. For example, in Greensboro-Winston-Salem-High Point, North Carolina, Landmark owns the only newspaper in Greensboro and television Station WFMY–TV, Channel 3, Greensboro; therefore, Hampton Roads maintains, failure to report these media interests has a substantial bearing on the cross-interest issue in this proceeding (see note 2, *supra*). Finally, Hampton Roads contends, failure to report these interests raises "grave character qualification questions" and demonstrates a pattern of ineptness and carelessness by WTAR.

3. The Broadcast Bureau supports addition of the requested issues. The Bureau claims that a study by it of the docket in this proceeding reveals that many of the CATV systems owned by Landmark and its subsidiaries and noted by Hampton Roads in its petition have not been reported in WTAR's application. The Bureau, upon checking the Commission's CATV files, states that it discovered that a CATV franchise was secured by Racine TeleCable Corp.[7] for Racine, Wisconsin, on January 10, 1969, and that on March 6, 1969, TeleCable Corp. filed a letter of notification pursuant to Section 75.1105 of the Commission's Rules that it would commence operation of a CATV system in Wytheville, Virginia, no earlier than April 7, 1969. Both of these acquisitions occurred prior to WTAR's filing of its renewal application on June 30, 1969, and were not disclosed in its application; therefore, the Bureau argues, a Rule 1.514 issue is warranted with respect to these interests. According to the Bureau the following subsidiaries of TeleCable Communications acquired CATV systems *after* the renewal application was filed: TeleCable of Columbus, Inc., Columbus, Georgia; Overland Park TeleCable Corp., Overland Park, Kansas; and TeleCable of Kokomo, Kokomo, Indiana.[8] In further support of the requested issues, the Bureau notes the Commission's concern for the "cumulative future effect of greater penetration of CATV systems franchised or applied for but not yet in operation", citing the *Second Report and Order* in Dockets Nos. 14895, 15233 and 15971, 2 FCC 2d 725, 744, 6 RR 2d 1717, 1744 (1966). Finally, the Bureau urges that a Rule 1.65 issue is also warranted in this proceeding.

4. In opposition, WTAR argues that the renewal application form (FCC Form 303) only required it to disclose that Landmark owns TeleCable Corporation. WTAR insists that the form did not require it to list each and every CATV system and its location.[9] WTAR therefore contends that it has not failed to disclose its business interests and that Hampton Road's reliance on *Media, Inc.*, *supra*, is misplaced.

[7] All the corporations mentioned by the Bureau are subsidiaries of TeleCable Communications, which is owned by Landmark.

[8] The Bureau asserts that the Kokomo system did not commence operation until after the filing of the renewal application; however, the Bureau states that it is unclear when the franchise was obtained. Therefore, it believes that either a Rule 1.514 or Rule 1.65 issue, or both, may be necessary.

[9] WTAR quotes from the instruction on Form 303 with respect to the applicant's business and media interests: "List below other businesses in which the applicant or any officer, director, or principal stockholder (any person owning 25% or more of applicant's stock) has a 25% or more interest. List also any radio station other than the station which is the subject of this application in which any of the named persons have any interest, and the nature and extent of their interest in the broadcast station."

WTAR insists that *Media* can be distinguished from the instant case because in *Media*, the applicant had failed to update its application to reflect all of its broadcast interests, as expressly required by Section II, paragraph 19, of FCC Form 301—the application form for new broadcast stations. According to WTAR, there is no comparable question in Form 303, the renewal application. As far as the Rule 1.65 issue is concerned, WTAR takes the position that if it was only required to report Landmark's ownership of TeleCorp and nothing more, then it was not required to update the application to reflect new acquisitions by TeleCorp. WTAR further argues that Hampton Roads is attempting to conceal that it had previously requested a Rule 1.65 issue against WTAR which was denied by the Review Board in its Memorandum Opinion and Order, released July 20, 1970, *supra*, 31 FCC 2d at 826, 19 RR 2d at 678–679.[10] (See paragraph 1, *supra*.) WTAR avers that the Rule 1.65 issue requested in 1970 was also premised on WTAR's alleged failure to report Landmark's acquisition of the Times World Corporation (owner of the two Roanoke, Virginia newspapers, a semi-weekly newspaper in Galex, Virginia, and a shopping center in Roanoke) and that the Board did not add an issue because the information was already before the Commission and there was no attempt by WTAR to conceal the information from the Commission.[11]

5. In a separate pleading, WTAR specifically responds to the Broadcast Bureau's support of Hampton Roads' request for Rule 1.514 and Rule 1.65 issues. WTAR argues that the Bureau is reversing its earlier position in this proceeding when it opposed Hampton Roads' previous request for a Rule 1.65 issue. The Bureau, WTAR continues, then argued that "it is clear that WTAR has complied fully with Commission requirements by supplying the information called for by Form 303 and the Commission's Rules", quoting from Broadcast Bureau's Comments on Petition to Enlarge Issues, filed April 17, 1970. WTAR concedes that Hampton Roads' previous request was "not entirely the same"; however, respondent claims that the reasoning behind the denial of that request is applicable here.[12]

6. At the outset, we must reject WTAR's argument that Hampton Roads' petition is procedurally deficient in that it again requests a Rule 1.65 issue against WTAR. The Board's previous denial of a request by Hampton Roads to add a Rule 1.65 issue against WTAR does

[10] In denying the request for a Rule 1.65 issue, the Board stated: Hampton Roads also requested a Rule 1.65 issue based on the same alleged failure of WTAR to reflect the ownership of Landmark Securities, etc. In its comments, the Bureau notes that such information had been effectively incorporated in the pending renewal application and that, therefore, such an issue was not warranted. In its reply petitioner renews its requests based on WTAR's alleged failure to show Landmark's acquisition of the Roanoke newspapers and its principals' other broadcast interests in the Norfolk and Roanoke areas through their VNB participation. Since other information had been before the Commission, albeit in other contexts, prior to designation here, since there has been no apparent intention to conceal such information from the Commission, and since the actual effect of such interests is still in doubt in this renewal proceeding, we are not predisposed to add a requisite Rule 1.65 issue. 31 FCC 2d at 826 n. 30, 19 RR 2d at 678–79 n. 30.

[11] On April 18, 1972, WTAR submitted a supplement to its opposition which states that the Hearing Examiner, on April 14, 1972, instructed WTAR to list "the locations of all the CATV systems owned and operated by TeleCable Corporation" and other media owned by WTAR, its officers and directors. WTAR states that it will supply the requested information.

[12] In its reply pleading, Hampton Roads reasserts many of the same arguments it advanced in its petition. In addition, it requests a concealment and misrepresentation issue because of WTAR's alleged continued failure to disclose its own media interests.

not preclude the Board from considering the present request. The two petitions are premised on essentially different facts. Thus, Hampton Roads' previous request for a Rule 1.65 issue was made in conjunction with its request for a Rule 1.615(a)(3)(iv) issue which was premised on WTAR's alleged failure in its application to report the owners of Landmark Securities [13] and those owners' other broadcast interests. The Board denied the request for a Rule 1.615 issue [14] because WTAR had filed an ownership report setting forth the names of the principals and their broadcast interests; consequently, a Rule 1.65 issue was not deemed to be warranted with respect to the alleged failure to report the owners and their interests. Also, we did not believe that a Rule 1.65 issue was warranted to explore Landmark's acquisition of two Roanoke newspapers because we did not know the effect these interests would have on this proceeding. (See note 10, *supra.*) As noted above, the present request for a Rule 1.65 issue by Hampton Roads is premised on grounds factually different from the earlier request. In short, the instant petition concerns WTAR's alleged failure to disclose the ownership interests of the owners and principals of WTAR in other media (CATV systems, radio and television stations, and newspapers). The request stands alone and is not associated with any other requested issue. Having determined that the instant petition is not procedurally infirm, we will now proceed to the merits.

7. Commission Rule 1.514(a) states that each applicant must "include all information called for by the particular form on which the application is required to be filed * * *." In our opinion, encompassed within Section 1, paragraph 7, of FCC Form 303, the renewal application, is the requirement that the applicant report not only its ownership of a corporation or corporations which own CATV interests—franchises and operating systems—but also the names and locations of each system. The Commission in *TV Signal Company of Aberdeen*, 23 FCC 2d 603, 19 RR 2d 298 (1970),[15] held that it was "not subject to debate" that renewal applicants must report the ownership of operating CATV systems on FCC Form 303. The Commission also held in *Aberdeen* that a renewal applicant must report the ownership of CATV franchises. In *Media, Inc., supra.*,[16] we held that adequate disclosure of CATV interests in a new application (FCC Form 301) required the applicant to disclose the name of *each* community served by a system in order that the Commission would be placed "in full possession of all of the facts which may bear on its

[13] Landmark Securities is a holding company which owns Landmark Communications.

[14] Rule 1.615 requires an applicant to file ownership reports. Rule 1.615(a)(3)(iv) specifically requires the applicant to set forth in the ownership report the identity and interest of any party who has "any direct, indirect, fiduciary, or beneficiary interest in the licensee or any of its stock."

[15] In *Aberdeen*, the Commission was requested to revoke the license of television Station KDLO–TV, Aberdeen, South Dakota, because the licensee had failed to report the ownership of twenty different CATV franchises, of which two represented operating systems. The Commission ultimately denied the petition to revoke.

[16] In *Media*, the petitioner requested the addition of a Rule 1.65 issue because of the alleged failure of the applicant to report all of its CATV interests. The applicant in opposing the request argued that it did not believe that the Commission's Rules required it to disclose in its application anything more than the location of the "headend" and that it was not required to list separately the four communities which received the programming from the "headend" as well as two proposed communities which would operate out of the "headend".

determination of whether the public interest would be served by a grant of an application." 22 FCC 2d at 877, 18 RR 2d at 1179. Likewise we believe the name and location of CATV franchises and systems owned by a renewal applicant for a television station is, without question, relevant to the Commission's statutory obligation to determine whether a grant of the application would be in the public interest. See Section 307(a) of the Communications Act of 1934, as amended. The ownership of CATV systems is relevant, for example, to the question of concentration of control, diversification and financial qualifications.[17] *Cf. Allied Broadcasting, Inc.* v. *FCC*, 140 U.S. App. D.C. 264, 435 F. 2d 68, 19 RR 2d 2071 (1971). These questions may be raised either in situations involving applications for new broadcast stations or in renewals; therefore, the ownership of all media of mass communications must be reported in full. For the foregoing reasons, we do not believe that WTAR's cryptic description of Landmark's ownership interests in CATV franchises and systems (see paragraph 2, *supra*) adequately complies with Section 1, paragraph 7, of FCC Form 303. *TV Signal Company of Aberdeen, supra.* Consequently, the addition of a Rule 1.514 issue is warranted. Moreover, since it appears from petitioners allegation that TeleCable may have acquired CATV franchises and systems *after* WTAR filed its application and since it further appears that WTAR has not amended its application to reflect those acquisitions, a Rule 1.65 issue is also warranted. See *Lake Erie Broadcasting Company*, 34 FCC 2d 354, 24 RR 2d 64 (1972). See also Report and Order on *Reporting of Changed Circumstances*, 29 FR 15516, 3 RR 2d 1622 (1964).

8. The Rule 1.514 and Rule 1.65 issues to be added herein will be specified on comparative bases only because both *Aberdeen, supra*, and *Media, Inc., supra*, upon which we rely for our authority, were released *after* WTAR filed its renewal application on July 1, 1969.[18] The Board is sympathetic with WTAR's argument that FCC Form 303 did not require it to report each of its CATV interests. Although we have indicated the Commission's policy that CATV interests owned by a renewal applicant must be disclosed in the renewal application, neither FCC renewal application Form 303 nor the FCC ownership report form (Form 323) contains a specific question to elicit this information; therefore, the Board believes that both forms should be revised to include a question designed to elicit the renewal appli-

[17] At the time we ruled on Hampton Roads' 1970 petition, the *Policy Statement on Comparative Hearings Involving Regular Renewal Applicants*, 22 FCC 2d 424, 18 RR 2d 1901 (1970), was in effect and diversification of control of the mass communications media was therefore not at issue in "phase one" of the proceeding. Since then, however, the *Policy Statement* was found to be "contrary to law" by the United States Court of Appeals for the District of Columbia Circuit. *Citizens Communications Center* v. *FCC*, 145 U.S. App. D.C. 32, 447 F. 2d 1201, 22 RR 2001 (1971). Therefore, diversification of control of the media is once again at issue in comparative proceedings involving regular renewal applicants. As the Court stated in the *Citizens Communications* case: "Since one very significant aspect of the public interest, convenience and necessity is the need for diverse and antagonistic sources of information, the Commission simply cannot make a valid public interest determination without considering the extent to which ownership of the media will be concentrated or diversified by the grant of one or another of the applications before it." 145 U.S. App. D.C. at 44 n. 35, 447 F. 2d at 1213 n. 36, 22 RR 2d at 2019 n. 36.

[18] Board Member Berkemeyer is of the opinion that a disqualifying Rule 1.65 issue is warranted for the failure of WTAR to report Landmark's subsequent acquisition of CATV interests.

cant's CATV interests. Pending such revision, and in order to deter other similar non-disclosures or omissions by other applicants and licensees, a typewritten notice could be included in all renewal and/or ownership forms mailed to licensees to place them on notice of this requirement.

9. WTAR's failure to report the acquisition of three Virginia newspapers by Landmark [19] and its apparent failure to report media interest acquired by P. S. Huber, Jr., *after* the filing of WTAR's application warrants exploration under the comparative Rule 1.65 issue to be specified herein. We do not believe petitioner has shown any intent on the part of WTAR to withhold this information from the Commission nor do we believe that this information is of such a serious nature as to reflect upon the applicant's basic qualifications; therefore, in our opinion, the comparative Rule 1.65 issue is sufficient to explore these omissions.[20] *Cf. RKO General Inc.*, 34 FCC 2d 265, 24 RR 2d 16 (1972); *Kittyhawk Broadcasting Corp.*, 17 FCC 2d 602, 16 RR 2d 73 (1969). The Board does not believe that Hampton Roads has presented sufficient allegations to warrant addition of concealment or misrepresentation issues. *Home Service Broadcasting Corp.*, 21 FCC 2d 565, 18 RR 2d 507 (1970). Nor, in our opinion, do petitioner's allegations demonstrate such a pattern by WTAR of carelessness, inadvertence or indifference to the Commission's Rules to warrant addition of an ineptness issue. See *Tung Broadcasting Company*, 33 FCC 2d 1145, 23 RR 2d 1185 (1972); *Edward C. Atsinger, III*, 29 FCC 2d 443, 21 RR 2d 1039 (1971).

False Swearing Issue

10. In support of its request for a false swearing issue, Hampton Roads asserts that WTAR's Ownership Report (FCC Form 323), which was filed in conjunction with WTAR's renewal application, was purportedly signed and certified on July 1, 1969, by Lee Colman Kitchin, President of WTAR Radio-TV Corporation; however, the date stamped on the form indicates that the report was received at the Commission on June 30, 1969. The certification is therefore false on its face, according to Hampton Roads. Petitioner does not speculate on how the date disparity arose, but suggests that perhaps Kitchin did not fully examine the report to determine if it was a complete and accurate statement of the business interests of WTAR. Several cases are cited by Hampton Roads to support the proposition that the Commission considers as a "serious matter" the preparation of

[19] The relevance of the newspaper acquisitions may have been "in doubt" in 1970 (see note 10, *supra*), but in view of the *Citizens Communications* decision, *supra*, note 16, it is clear today.

[20] The fact that WTAR intends to comply with the Examiner's oral Order of April 14, 1972 (see note 11, *supra*) and supply a list of its media interests for the record does not, in our view, absolve the applicant of possible violations of the Commission's reporting rules. WTAR was required to report the necessary information in its renewal application and to keep the information up-to-date thereafter. *Cf. Folkways Broadcasting Company*, 27 FCC 2d 614, 21 RR 2d 158 (1971). An eleventh hour attempt to report information which should have been reported years ago will not suffice.

accurate documents submitted for its consideration and the signing of those documents to verify their validity.[21]

11. In opposition, WTAR asserts that its application has been on file with the Commission since June 30, 1969; yet Hampton Roads waited two and a half years before requesting an issue relating to the apparent date discrepancy.[22] WTAR concedes that the application was postdated; however, it denies that the contents therein were untrue. The document was postdated, WTAR explains, because it was intended to reflect WTAR's business as of July 1, 1969; if any changes had taken place between June 30 and July 1, WTAR would have amended its report. The Broadcast Bureau also opposes the requested issue. The Bureau believes that the date discrepancy is minor and only indicates that the report was postdated. The Bureau notes that the filing date for all renewal applications for the Commonwealth of Virginia was July 1, 1969. In the Bureau's opinion, WTAR merely beat its target date.

12. In reply, Hampton Roads argues that WTAR did not present an affidavit from Kitchin or any other principal of WTAR–TV opposing the requested false swearing issue; therefore, since no explanation was presented, an issue is warranted. Hampton Roads also argues that the date discrepancy is not "minor" particularly in light of the failure to fully disclose the media interests owned by WTAR's parent, Landmark. Petitioner next contends that WTAR filed ownership reports not only for the licensee but one for Landmark, and one for Landmark Securities which were also filed on June 30, 1969; yet each form was dated July 1, 1969, and contained "glaring omissions" of media interests held by each company (for example, Landmark's ownership of WFMY–TV in Greensboro, North Carolina was allegedly not mentioned in the statement).

13. We do not agree with Hampton Roads that the discrepancy in dates warrants a "false swearing" or character qualifications issue against WTAR. On the face of the Ownership Reports, there is a discrepancy in the dates between the signing by Kitchin and the filing date, indicating postdating; however, Hampton Roads has not presented any facts which suggest that any untrue statements were presented in the reports. In our view, an evidentiary inquiry is not warranted without more facts suggesting that the documents themselves are not accurate.[23] WTAR's alleged failure to report all of its media interests in its renewal application would not necessarily make the statements contained in the ownership reports untrue; rather they would make the reports incomplete. Moreover, the cases cited by

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[21] Hampton Roads cites, *inter alia*: *Sumiton Broadcasting Co., Inc.*, 20 FCC 2d 669, 17 RR 2d 1038 (1969); *Chapman Radio and Television Co.*, 7 FCC 2d 464, 9 RR 2d 907 (1967); *William S. Hogin*, 1 FCC 2d 670 (1965) (an Initial Decision made effective pursuant to Rule 1.276); *KAYE Broadcasters, Inc.*, 25 FCC 2d 96 (1970).

[22] Because this timeliness argument is no longer a valid contention (see note 2, *supra*), the Board will not discuss it further. *WPIX, Inc., supra*, 34 FCC 2d at 420 n. 5, 24 RR 2d at 62 n. 5.

[23] The obligation was on the petitioner to allege sufficient facts to raise a substantial question warranting the addition of the false swearing issue. It was not up to WTAR to make a case against itself. The burden was on Hampton Roads, as the petitioner, to justify the addition of an issue. *Cf. Phil D. Jackson*, 33 FCC 2d 928, 932, 23 RR 2d 1023, 1028 (1972).

Hampton Roads (see note 18, *supra*) are inapposite in that they deal with misrepresentations and falsifications of statements in documents submitted to the Commission.[24] No facts presented by Hampton Roads suggest that WTAR's reports were falsified. For all of the foregoing reasons, Hampton Roads' request for a false swearing issue will be denied.

14. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed March 16, 1972, by Hampton Roads Television Corporation, IS GRANTED to the extent indicated below, and IS DENIED in all other respects; and

15. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED to include the following issues:

(a) To determine whether WTAR Radio-TV Corporation (WTAR-TV) failed to comply with Section 1.514(a) of the Commission's Rules; and, if so, to determine the effect thereof upon the applicant's comparative qualifications to be a Commission licensee; and

(b) To determine whether WTAR Radio-TV Corporation (WTAR-TV) failed to amend its application as required by Section 1.65 of the Commission's Rules; and, if so, to determine the effect thereof upon the applicant's comparative qualifications to be a Commission licensee;

14. IT IS FURTHER ORDERED, That the burden of proceeding with introduction of evidence under the issues added herein SHALL BE on Hampton Roads Television Corporation and the burden of proof thereunder SHALL BE on WTAR Radio-TV Corporation (WTAR).

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[24] In addition, *William S. Hogin, supra,* in an Initial Decision made effective without Commission review. As such, it is "not final and has no weight as precedent". *Alabama Microwave, Inc.,* 21 FCC 2d 549, 553, 18 RR 2d 475, 480 (1970), review denied FCC 70-652, released June 26, 1970. See *WFPG, Inc.,* 33 FCC 673, 677, 24 RR 418, 425 (1962).